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✓
A PRACTICAL TREATISE
ON THE
STATUTES OF LIMITATIONS.
IN
ENGLAND AND IRELAND.

BY
(THE LATE) J. GEORGE N. DARBY,

Of Lincoln's Inn, Barrister-at-Law,

AND

FREDERICK ALBERT BOSANQUET,

Of the Inner Temple, Barrister-at-Law.

SECOND EDITION, REVISED AND ENLARGED,

BY

FREDERICK ALBERT BOSANQUET,

Of the Inner Temple, now one of Her Majesty's Counsel,

AND

JAMES ROBERT VERNAM MARCHANT,

Of Gray's Inn, Barrister-at-Law.

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PREFACE TO THE SECOND EDITION.

THE first edition of this work, which appeared in 1867, has been for some time out of print, and it has been thought that a new edition might be useful to the legal profession. Mr. Darby, who first put his hand to the work, died soon after its publication, and another editor has taken his place in preparing the present edition.

Since 1867 several statutes have been passed which have made considerable changes in the law on the subject of the limitation of actions. The most important of these statutes are the Real Property Limitation Act, 1874, the Judicature Act, 1873, the Married Women's Property Act, 1882, and the Trustee Act, 1888. A great number of cases bearing on these Acts and the earlier Acts, and connected with the subject of this book, have also been decided since the publication of the first edition.

The present editors have endeavoured to supply omissions which had been found in the original work, and, by incorporating the enactments and judicial decisions which are later than 1867, to make this edition a correct exposition of the law as it stands at the present time.

The text and the arrangement of the old edition have been followed; but the chapter on Pleading in Equity has been omitted as obsolete. A new chapter has been added on actions of tort by and against executors and administrators, and another on the rules generally

applicable to the construction of all Statutes of Limitations. Although no more change has been made than seemed necessary, yet the amount of fresh matter introduced is considerable, and the whole treatise from beginning to end has been re-written; every citation has been verified afresh; the Appendix of Statutes has been considerably altered and enlarged and now contains marginal references to the pages of the text in which the various sections of the statutes are discussed; a new Table of Contents and a fuller and more complete Index have been made; a Table of Statutes and Rules of Court has been inserted and the references to the reports have been added in the Table of Cases.

An attempt has been made to follow the course in Ireland of those legislative enactments and judicial decisions which affect the Statutes of Limitations; and wherever the English Rules of the Supreme Court are referred to, reference will be found to the corresponding rules which are now in force in Ireland. It is hoped that both in England and Ireland the second edition will meet with the same favour that was shown to the first.

F. A. BOSANQUET.
J. R. V. MARCHANT.

3, Paper Buildings, Temple.
September, 1893.

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ADDENDA ET CORRIGENDA.

Page 10, note (7), for " p. 12," read " p. 13."

Page 11, note (4), *ins. ad fin.*, " See *Soar v. Ashwell*, W. N. 1893, 143."

Page 13, note (2), *ins. ad fin.*, " *Thorne v. Heard*, 41 W. R. 636."

Page 15, note (2), *ins. ad fin.*, " See *In re Low. Bland v. Low*, 37 Sol. Jo. 731; W. N. 1893, 139."

Page 20, note (7), *ins. ad fin.*, " But see *Midgley v. Midgley*, 41 W. R. 659."

Page 30, note (3), *ins. after re Brown*, " [1893], 2 Ch. 300."

Page 32, note (4), *ins. ad fin.*, " But see *Wolmershausen v. Gullick* [1893], 2 Ch. 514."

Page 61, line 16, for " seems," read " seem."

Page 115, note (6), *ins. ad fin.*, " *In re Hawes. In re Burchell. Burchell v. Hawes*, 62 L. J. Ch. 463; 67 L. T. 756."

Page 146, note (3), *ins. after Brown v. Brown*, " [1893], 2 Ch. 300."

Page 155, note (1), *ins. after Dibb v. Walker*, " [1893], 2 Ch. 429; 41 W. R. 427."

Page 159, note (4), *ins. after Dibb v. Walker*, " [1893], 2 Ch. 429; 41 W. R. 427."

Page 233, note (2), *ins. after Dibb v. Walker*, " [1893], 2 Ch. 429."

Page 247, note (3), *ins. ad fin.*, " See *Tinker v. Rodwell*, 9 Times L. R. 657; 95 L. T. Newsp. 381."

Page 252, note (3), *ins. ad fin.*, " See *Soar v. Ashwell*, 1893, W. N. 143."

Page 254, note (3), *ins. ad fin.*, " *In re Hawes. In re Burchell. Hawes v. Burchell*, 62 L. J. Ch. 463; 67 L. T. 756."

Page 260, note (5), *ins. ad fin.*, " See *Thorne v. Heard*, 41 W. R. 636."

Page 282, note (3), *ins. after Howitt v. Earl of Harrington*, " [1893], 2 Ch. 497."

Page 289, note (2), *ins. after Willis v. Earl Howe*, " [1893], 2 Ch. 545."

Page 294, note (1), *ins. ad fin.*, " See *Haigh v. West* [1893], 2 Q. B. 19."

Page 296, note (3), *ins. ad fin.*, "*Bevan v. London Portland Cement Co. Limited*, 67 L. T. 615."

Page 392, line 21, for "or," read "and."

Page 394, note (3), *ins. ad fin.*, *Tinker v. Rodwell*, 9 Times L. R. 657; 95 L. T. Newsp. 381.

Page 416, notes (4) & (5), for "*Life Assurance*," read "*Life Association*."

Page 439, line 5, *del.* "(b)."

Page 451, note (4), *ins. ad fin.*, "[1893], 2 Ch. 545."

Page 494, note (1), after *Tichborne v. Weir*, *ins.* "67 L.T. 735."

Page 495, note (5), after *Willis v. Earl Howe*, *ins.* "[1893], 2 Ch. 545."

Page 522, line 8 from the bottom, for "7," read "47."

Page 531, note (4), for "37 & 38 Vict.," read "38 & 39 Vict."

THE STATUTES OF LIMITATIONS.

INTRODUCTORY CHAPTER.

THE object of this treatise is to consider the way in which the rights of parties in actions, both at law and in equity, and titles to real property, are affected by the various Statutes of Limitations now in force. This treatise, from its nature, necessarily deals with almost every right that can become the subject of litigation; these rights, and the remedies by which they can be enforced, are dealt with in such varied combinations in the principal Statutes of Limitations and the amending and modifying Acts, that a clear and systematic arrangement of the subject is very difficult. The different parts of the subject are dealt with in the following order:—

I. The statute 21 Jac. I. c. 16 provides limitations for most personal actions in England, founded on simple contract or tort. These limitations and the provisions of the later statutes which modify them, and the corresponding enactments which apply to Ireland, form the subject of Part I.

II. The statute, 3 & 4 Wm. IV. c. 42 provides limitations for certain personal actions in England (chiefly actions on specialties) which are not included in the statute of James. These limitations and the corresponding Irish Acts form the subject of Part II.

III. Part III. deals with the limitations that affect

the recovery of money charged on land, the principal enactments on this subject being the 42nd section of 3 & 4 Wm. IV. c. 27 and the 8th section of 37 & 38 Vict. c. 57, which has taken the place of the 40th section of 3 & 4 Wm. IV. c. 27.

IV. Part IV. treats of the general principles of equity that apply to the subject-matter of the preceding parts.

V. Part V. treats of the limitations that affect the recovery of and the title to real property. The law on this subject is comprised in the remaining sections of 3 & 4 Wm. IV. c. 27 as amended by 37 & 38 Vict. c. 57.

VI. Part VI. deals with the limitations attached to penal actions.

VII. Part VII. deals with the limitations that affect the rights of the Crown, and with certain proceedings in Crown practice.

VIII. Part VIII. treats of the proper mode of pleading the various statutes and of the process which amounts to the commencement of an action so as to save the bar of the statutes.

IX. Part IX. treats of miscellaneous limitations under various Acts.

PART I.

SIMPLE CONTRACTS AND TORTS.

CHAPTER I.

ACTIONS WITHIN 21 JAC. I. CAP. 16, S. 3.

THE principal Statute of Limitations now in force relating to actions arising out of simple contracts or torts, is the 21st Jac. I. cap. 16. The 3rd section of that statute is as follows:—

PART I.
CH. I.
—

“ All actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action sur trover and replevin for taking away of goods and cattle, all actions of account and upon the case [other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants] (1), all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrearages of rents, and all actions of assault, menace, battery, wounding and imprisonment, or any of them which shall be sued or brought at any time after the end of this present session of parliament, shall be commenced and sued within the time and limitation hereinafter expressed and not after (that is to say), the said actions upon the case (other than for slander), and the said actions for account, and the said actions for trespass, debt, detinue and replevin for goods or cattle, and the said action of trespass *quare*

21 Jac. 1,
c. 16, s. 3.

(1) See p. 5.

PART I
CH. I.

clausum fregit within three years next after the end of this present session of parliament or within six years next after the cause of such actions or suit, and not after; and the said actions of trespass, of assault, battery, wounding, imprisonment or any of them, within one year next after the end of this present session of parliament, or within four years next after the cause of such actions or suit, and not after: and the said actions upon the case for words within one year after the end of this present session of parliament, or within two years next after the words spoken and not after."

The effect of this section, as altered by the Mercantile Law Amendment Act (1), is that all actions on the case (except slander), actions of account, of trespass *quare clausum fregit*, of debt grounded upon any lending or contract without specialty, of debt for arrears of rent, of detinue, of trover and of replevin, must be brought within six years; actions of assault, battery, wounding and imprisonment within four years after the cause of action has arisen; and actions of slander within two years next after the words spoken. Although there are no longer, since the Judicature Act, 1873, actions bearing these names, yet the actions which have taken their place (2) are governed by the same rules, and to all intents and purposes are the same actions.

Mesne
profits.

An action for mesne profits is an action of trespass within this section, and a plea of the statute in such an action would prevent more than six years' arrears being recovered (3).

Trover.

In the latter part of the section the actions are not enumerated in the same way as in the former part, and trover is omitted in the latter part. But soon after the passing of the statute it was held (4) that trover was

(1) 19 & 20 Vict. c. 97. See p. 5.

(2) *Gibbs v. Guild*, 9 Q. B. D. 67.

(3) B. N. P. 88; *Adams' Ejectment*, 3rd ed., p. 386; *Reade v. Reade*, 5 Ves. 744.

(4) *Swayn v. Stephens*, Cro. Car. 245; 2 Wms. Saund. 395.

included in the words "actions on the case" in the latter part of the section.

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In the same clause of the section the words limiting "actions of trespass, of assault, battery, wounding, imprisonment or any of them" to four years are clearly descriptive of the kinds of trespass intended to be referred to, and all other actions of trespass are included in the preceding clause.

Actions of
trespass.

Actions for slander where the words are not of themselves actionable without special damage do not come within "actions upon the case for words" in the last clause, but are within "actions upon the case" in the earlier clause, and the limitation for such actions is six years from the happening of the damage (1). It is submitted that the dictum of Lord Cranworth to the contrary effect in *Backhouse v. Bonomi* (2) is inconsistent with the authorities (3). The now obsolete action on the case of *scandalum magnatum* was held not to be within the statute (4).

Slander.
"

The exception of merchants' accounts in the statute of James is repealed by the 9th section of the Mercantile Law Amendment Act, 1856 (5), which enacts that all actions of account, or for not accounting, and suits for such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, shall be commenced and sued within six years after the cause of such actions or suits, or within six years after the passing of the Act. It had been decided before the Mercantile Law Amendment Act that the exception in the statute of James extended only to actions brought in the form of actions of account, or on the case for not accounting, or at least to cases in which actions in one of these forms

Merchants
accounts.

(1) *Saunders v. Edwards*, 1 Sid. 95; *Law v. Harwood*, Cro. Car. 140; *Topsall v. Edwards*, Cro. Car. 163; *Broune v. Gibbons*, 1 Salk. 206. But see *Littleboy v. Wright*, 1 Lev. 69.

(2) 9 H. L. Cas. 503; 34 L. J. Q. B. 181.

(3) See *Darley Main Colliery Co. v. Mitchell*, 11 App. Cas. 127.

(4) *Sayes'* case cited (*arguendo*) Litt. 342.

(5) 19 & 20 Vict. c. 97.

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would lie (1). The effect of the Mercantile Law Amendment Act is that the statute of James can be pleaded in an action between merchants brought to recover a balance of account due more than six years before action. An old claim is not kept out of the statute of James by the fact of there being some items in the same account less than six years old (2).

As a person has a right to sue for any balance of account which has become due to him within the six years, and it is impossible to ascertain such balance without knowing in what character the payments on each side of a running account were made, it seems necessary that both parties should have the right of referring to the older entries, in order to ascertain whether at the time when any particular sum was placed to the credit of either party within the six years there was not in fact a balance due to him, to the discharge of which the sum so placed was attributable.

What
actions
are not
within the
statute.

An action by a lord against a copyholder for fines is not within the statute of James (3), but is provided for by 3 & 4 Wm. IV. c. 42, s. 3 (4); nor is an action of debt for rent reserved on an indenture of demise (5); nor is an action for a rent-charge or arrears of a rent-charge (6); nor is an action of debt grounded on a statute. These actions do not come within the description of an action of debt grounded on any lending or contract without specialty (7). In the *Cork and Bandon Railway Com-*

(1) *Inglis v. Haigh*, 8 M. & W. 769; *Cottam v. Partridge*, 4 M. & G. 271; *Mills v. Fowkes*, 5 Bingh. N. C. 455; *Tatam v. Williams*, 3 Hare, 357; 2 Wms. Saund. 402.

(2) *Knox v. Gye*, L. R. 5 H. L. at p. 672.

(3) *Hodgson v. Harris*, 1 Lev. 273, reported *sub variis nominibus*, 2 Keb. 462, 497, 533, 536; 1 Sid. 415.

(4) See *post*, Pt. II. Ch. I.

(5) *Freeman v. Stacy*, Hutton, 109.

(6) *Stackhouse v. Barnston*, 10 Ves. 453, 467; *Cupit v. Jackson*, McClelland, 495; 13 Price, 721; *Collins v. Goodall*, 2 Vern. 235.

(7) *Jones v. Pope*, 1 Wms. Saund. 55; 1 Sid. 305; *Talory v. Jackson*, Cro. Car. 513; *Cork and Bandon Railway Co. v. Goode*, 13 C. B. 826; 22 L. J. C. P. 198; *Shepherd v. Hills*, 11 Exch. 67.

pany v. Goode (1), Maule, J., says in his judgment:—

“There may be cases where a statute enables an action to be brought, which nevertheless is not an action on the Act of Parliament.” The action for money had and received given by the Copyhold Act, 1852 (2), s. 47, may be such a case. Where a statute directed that a borough situate in a county and assessed to the county rate should be recouped the proportionate amount contributed by the borough to the expenses incurred by the county in pursuance of the statute, it was held that if an action by the borough for the recovery of the expenses would lie against the county, such an action would be an action on the case, and not an action for debt on a statute, and would therefore be within the statute of James (3).

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CH. I.

Debts
under a
statute.

In a proceeding by guardians of a union to recover the expenses of the maintenance of a lunatic, Chitty, J., held that the lunatic could set up the statute of James, and that only six years' arrears were recoverable, whether the liability was a statutory one (by 16 & 17 Vict. c. 97, s. 104), or whether the liability was a debt independent of but recognised by statute (4). Where a corporation was by charter empowered to make bye-laws, and a bye-law was made inflicting penalties on the members to be recovered by an action of debt, it was held that such an action was within the statute of James (5). The ground of this decision seems to have been that the consent of the defendant to become a member of the company created a liability in the nature of a simple contract; and the question in all cases of this sort appears to be whether the liability arises from any contract, express or

(1) 13 C. B. 826; 22 L. J. C. P. 198.

(2) 15 & 16 Vict. c. 51.

(3) *Mayor, &c., of Salford v. County Council of Lancashire*, 25 Q. B. D. 384.

(4) *In re Newbegin's Estate. Eggleston v. Newbegin*, 36 Ch. D. 477.

(5) *Tobacco Pipe Makers Co. v. Loder*, 16 Q. B. 765; 20 L. J. Q. B. 414.

PART I
CH. I.
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Liability
under com-
pany's deed
and Com-
panies Act,
1862.

Specialty
debts.

implied, entered into by the party himself, or is imposed upon him without any consent or act of his own. By the Seed Supply (Ireland) Act, 1880 (1), the guardians of the poor are authorised to borrow money for the purchase of seed, and such seed may be sold to occupiers of land, and payment of the price is to be recovered by a special rate as if it were poor rate. In a case which arose under this Act (2) the guardians claimed the price of seeds sold and delivered to the defendant; special rates had been made by the plaintiffs on the defendant on 25th November 1880, 24th November 1881, and 23rd November 1882; the civil bill was served on the defendant on 10th June 1889. The defendant claimed the benefit of the statute of James, but the plaintiffs contended that the liability was imposed by statute, and was not within the statute of James, and the Court so held. The liability of a shareholder under the deed of settlement establishing a banking company is not within the statute of James, when the liability is created by some clause in the deed (3). The liability of a contributory to pay calls under the Companies Act, 1862, s. 75, is to be deemed a debt by specialty, and is not within the statute of James (4). By the Companies Act, 1862, s. 16, all moneys payable by any member to a company incorporated under the Act in pursuance of any of the regulations of the company shall be in the nature of a specialty debt, and therefore actions to recover such moneys would not be within the statute of James.

A debt on a foreign judgment is not a specialty in England, and is therefore within the statute of James (5). A contract by specialty, concluded in India but sued upon in England, is not within the

(1) 43 Vict. c. 1.

(2) *Guardians of the Poor of the Union of Magherafelt v. Gribben*, 24 L. R. Ir. 520.

(3) *In re Portsmouth Banking Co.*, L. R. 2 Eq. 167.

(4) *Buck v. Robson*, L. R. 10 Eq. 629.

(5) *Dupleix v. De Roven*, 2 Vern. 540.

statute (1). The advance of money on the security of a deposit of title-deeds creates only a simple contract debt, and therefore the remedy against the debtor personally, irrespective of the charge on the land, is within the statute of James (2). An action of debt against a sheriff for money levied by him under a *fi. fa.* on a judgment obtained by the plaintiff is a debt founded on record, and therefore not within the statute (3). An action of debt on an award made by an arbitrator under his seal was held not to be within this statute (4). But by 3 & 4 Wm. IV. c. 42, s. 3, actions of debt upon any award when the submission is not by specialty, are required to be brought within six years (5). Where simple contract debts were recited in a deed which contained a covenant by the creditor not to sue for a certain time, but there was no covenant by the debtor for payment of the debts, it was held that the debts were not made specialty debts by the deed so as to be excluded from the statute (6). Where a debtor executed a warrant of attorney in favour of a creditor to secure a debt, but no judgment was entered up for the amount, it was held that the case was not taken out of the statute of James, as the warrant of attorney does not create a specialty debt until judgment is entered up in pursuance of it (7).

Where two join in a bond, and one pays the whole debt, the liability of the co-debtor to the one who pays the whole debt was, before the Mercantile Law Amendment Act, 1856, a liability by simple contract, and therefore within the statute of James (8). But now by the 5th section of the Mercantile Law Amendment Act,

(1) *Alliance Bank of Simla v. Carey*, 5 C. P. D. 429.

(2) *Brocklehurst v. Jessop*, 7 Sim. 438; *Firth v. Slingsby*, 58 L. T. 481.

(3) *Cockram v. Welby*, 2 Show. 79; 2 Mod. 212.

(4) *Hodsdon v. Harridge*, 2 Wms. Saund. 150.

(5) See *post*, Pt. II. Ch. I.

(6) *Iven v. Elwes*, 3 Drew. 25.

(7) *Clarke v. Figs*, 2 Stark. 234.

(8) *Copis v. Middleton*, T. & R. 224.

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1856 (1), when one joint obligor pays the whole debt, he stands in the place of the creditor, and may sue in his name.

Devastavit. The statute of James applies to an action founded on a *devastavit* against an executor personally (2). Such an action is barred at the expiration of six years from the *devastavit*, but the defence of the statute can only be set up when the executor is sued personally; when he is sued as executor he cannot set up a *devastavit* by way of defence so as to bring himself within the protection of the statute (3).

Actions by
cestuis que
trustent
against
trustees.

The statute of James does not apply to actions brought by *cestuis que trustent* against their trustees on an express trust. By the Judicature Act, 1873 (4), s. 25, subs. 2, "No claim of a *cestui que trust* against his trustee for any property held on an express trust or in respect of any breach of such trust shall be held to be barred by any Statute of Limitations." This is a statutory enactment of that which has always been recognised in Courts of Equity (5). Some exceptions have been engrafted on the rule by the Trustee Act, 1888 (6), the provisions of which will be more conveniently discussed hereafter (7).

Who are
trustees.

The decisions, with reference to the statute, defining who are and who are not trustees, have given rise to some nice distinctions. A banker and his customer do not stand in the relation of trustee and *cestui que trust*, but only of debtor and creditor by simple contract, and an agreement to pay interest makes no difference in this respect (8). Where, however, trustees had an account with

(1) 19 & 20 Vict. c. 97.

(2) *Thorne v. Kerr*, 2 K. & J. 54. *In re Gale. Blake v. Gale*, 22 Ch. D. 820.

(3) *In re Marsden. Bowden v. Layland*, 26 Ch. D. 783. *In re Hyatt. Bowles v. Hyatt*, 38 Ch. D. 609.

(4) 36 & 37 Vict. c. 66.

(5) *In re Cross. Harston v. Tenison*, 20 Ch. D. 121.

(6) 51 & 52 Vict. c. 59. s. 8.

(7) See p. 12 and *post*, Part IV. Chap. II.

(8) *Foley v. Hill* and cases cited, 1 Phill. 399-404; 2 H. L. C. 28; *Pott v. Clegg*, 16 M. & W. 321.

bankers who had notice that it was a trust account, and the bankers, upon a cheque being drawn on the account at their suggestion by the husband of the tenant for life of the trust fund, applied the cheque in discharge of a debt due to them from him, it was held in a bill filed by the trustees against the bankers that the Statute of Limitations did not apply (1). The liability of a solicitor to account for money of his clients received in the ordinary way of business is a liability by simple contract, and the statute runs in his favour (2). Where a solicitor is employed to invest his client's money in a particular security, the relation of trustee and *cestui que trust* does not exist between the solicitor and his client; and where a solicitor is employed to find securities to be approved by the client and then to invest, the solicitor is not a trustee if the client approves of the investment (3). But when a solicitor or agent has general authority to invest money in his hands on sufficient security, the employment is fiduciary, and the statute will not run (4). Where an agent is employed to sell real estate and collect personal estate and invest the proceeds in land or funds as he should think fit, with power to vary the securities and to deal with the fund just as if the principal were himself dealing with it, such an agent is a trustee, and the Statute of Limitations does not apply (5). So where one person is left in entire management of the affairs of another person with power to act as he should think most advantageous to the owner, the relation of a trustee and *cestui que trust* exists (6). The statute does not run between partners, but begins to run

(1) *Bridgman v. Gill*, 24 Beav. 302. See *Ex parte Gowers*, 3 Mont. & A. 172.

(2) *In re Hindmarsh*, 1 Dr. & Sm. 129; *Watson v. Woodman*, L. R. 20 Eq. 721, at p. 731.

(3) *Dooby v. Watson*, 39 Ch. D. 178.

(4) *Power v. Power*, 13 L. R. Ir. 281.

(5) *Burdick v. Garrick*, L. R. 5 Ch. 233.

(6) *Gray v. Bateman*, 21 W. R. 137.

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as soon as the partnership is determined (1). A surviving partner is not a trustee for the representatives of the deceased partner, and the statute runs in favour of a surviving partner (2). Where a person, who had during the lifetime of an intestate received the rents of the property of the intestate as her agent and paid them to a separate account at his bank, continued after the death of the intestate to receive the rents and pay them into his bank as before, stating that he was acting as agent for the true heir whoever he might be, it was held on his being sued by an assignee of the heir that he had made himself trustee of the accumulated rents, and that the claim for these rents was not barred by statute (3). Where a fund was established for granting pensions and annuities to members and their widows and children, and certain persons were appointed managers and declared to be trustees of the fund, and the property was vested in them, it was held that they were trustees for the persons who had a right to have a certain portion of the fund appropriated to them, and that a defence of the statute could not be set up against a claimant on the fund (4). A receiver appointed under an order of the Court is a trustee, and cannot avail himself of the statute (5). The statute does not apply to a claim against directors of a company for breach of trust or to a proceeding under sect. 165 of the Companies Act, 1862 (6). An auditor of accounts is not a trustee, and the statute runs in his favour (7); so too of the secretary of a company (8).

(1) *Barton v. North Staffordshire Railway Co.*, 38 Ch. D. 458, 463.

(2) *Knox v. Gye*, L. R. 5 H. L. 656, at p. 676.

(3) *Lyell v. Kennedy*, 14 App. Cas. 437.

(4) *Edwards v. Warden*, 1 App. Cas. 281.

(5) *Seagram v. Tuck*, 18 Ch. D. 296.

(6) 25 & 26 Vict. c. 89. *In re Exchange Banking Co. Flitcroft's Case*, 21 Ch. D. 519. *In re Sharpe. In re Bennett. Masonic and General Life Assurance Co. v. Sharpe* (1892), 1 Ch. 154. *Municipal, &c., Co. v. Pollington*, 63 L. T. 238.

(7) *Leeds Estate Building and Investment Co. v. Shepherd*, 36 Ch. D. 787.

(8) *Municipal, &c., Co. v. Pollington*, *ubi supra*.

Now by sect. 8 of the Trustee Act, 1888 (1), a trustee or any person claiming through him may avail himself of the statute in all cases except where the claim is founded upon fraud or fraudulent breach of trust to which the trustee was party or privy, or where the claim is to recover trust property or the proceeds thereof still retained by the trustee or previously received by the trustee and converted to his use (2).

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CH. I.
Trustee
Act, 1888.

The right which simple contract creditors now have by statute (3) against the real estate of their deceased debtors is within the equity of the statute of James (4); so also was the right of marshalling, which before 3 & 4 Wm. IV. c. 104, was the only means whereby simple contract creditors could get at the real estate of a deceased debtor (5).

Right of
simple
contract
debtors
against
real assets.

There was no statute which limited the time for applying for a writ of mandamus under the Common Law Procedure Act, 1854 (6), s. 68. Consequently, in an action against a local board for money due from the board claiming a mandamus to the board to levy a rate to pay the debt, a plea averring that the cause of action did not accrue within six years was held bad on demurrer (7). The 68th section of the Common Law Procedure Act has been repealed (8), and the procedure is now regulated by R. S. C., 1883, O. LIII. rr. 1-4 (9); but it seems that the case cited still holds good, and that no Statute of Limitations applies to a claim for a mandamus in an action. But in such an action a defence that the debt for which the rate was to be levied

Action for
mandamus.

(1) 51 & 52 Vict. c. 59.

(2) See *Moore v. Knight* (1891), 1 Ch. 547; *re Bowden, Andrew v. Cooper*, 45 Ch. D. 444; *re Gurney*, (1893), 1 Ch. 590.

(3) 3 & 4 Wm. IV. c. 104.

(4) *Fordham v. Wallis*, 10 Hare, 217; 22 L. J. Ch. 548.

(5) See *post*, Part I. Chap. V.

(6) 17 & 18 Vict. c. 125.

(7) *Ward v. Lowndes*, 1 E. & E. 940, 956; 29 L. J. Q. B. 40.

(8) 46 & 47 Vict. c. 49.

(9) R. S. C. Ir., 1891, O. LIII. rr. 1-4.

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was a simple contract debt for which the ordinary remedy by action was barred by the statute of James would probably be a sufficient answer to the claim for a mandamus, the granting of which is to a certain extent within the discretion of the Court (1).

By the 210th section of the Public Health Act, 1875 (2), an urban sanitary authority has no power to make general district rates retrospectively, except for expenses incurred within six months before the making of the rate. And it seems that the Court will not grant a mandamus to make a rate for the payment of a debt, if the party to whom the debt is due does not apply till more than six months from the time when the debt was incurred (3). But where the claim of the plaintiff was for compensation for damage done by the works of the board, it was held that the six months should be reckoned from the time the amount payable for such damage was settled by arbitration (4).

Seamen's
wages.

A suit for seaman's wages in the Admiralty Court seems to have been considered within the equity of the statute of James (5), but this was expressly provided for by 4 & 5 Anne, c. 3, s. 17 (also called 4 Anne, c. 16), by which such suits are limited to six years after the cause of action accrues.

Action *in*
rem.

An action *in rem* for damages to a ship by collision is not within the statute of James or within any Statute of Limitations (6).

(1) See *Ward v. Lowndes*, *u. s.*, and per Byles, J., 15 C. B. N. S. 199; 33 L. J. C. P. 31.

(2) 38 & 39 Vict. c. 55.

(3) *Ward v. Lowndes*, 1 E. & E. 940; 28 L. J. Q. B. 265; S. C. in error, 1 E. & E. 956; 29 L. J. Q. B. 40; *Ringland v. Lowndes*, 15 C. B. N. S. 173; 33 L. J. C. P. 25 (reversed on another point, 17 C. B. N. S. 514).

(4) *Ringland v. Lowndes*, *u. s.*

(5) *Hide v. Partridge*, 2 Salk. 424; 3 Salk. 227; 2 Ld. Raym. 1204; *Ewers v. Jones*, 3 Salk. 227.

(6) *The Kong Magnus* (1891), P. 223.

Before the Indian Limitation Act, 1859, the statute of James applied to India (1).

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Where a contract is made in one country and an action is brought on it in another, all questions concerning the remedy, including the question as to the period within which the remedy can be enforced, must be decided by the law of the country where the action is brought (2).

Lex loci.

✓ The statute does not destroy the right, it only bars the remedy (3). Hence, if a creditor has any means of enforcing his claim other than by action, the statute will not prevent him from recovering by such means. Where a defendant in an action of trover brought in 1800 was entitled to a lien on the goods sought to be recovered for a sum due in 1790, it was held by Lord Eldon that, although the remedy of the defendant by action was barred, the debt was not discharged and the lien was valid and subsisting (4). So where a judgment was obtained in an action in 1823, but no proceedings were taken by the plaintiff's attorney either in that action or to recover his own bill of costs, after Easter Term 1824, and in June 1830, a *fieri facias* issued at the suit of the plaintiff against the defendant for the amount of damages and costs, and the attorney claimed a lien on the judgment for his bill of costs, it was held that, although an action by the attorney against the plaintiff for his bill of costs would have been barred by the statute, yet he had

Remedy by
action only
barred.

Lien.

(1) *Ruckmaboye v. Lulloobhoy Mottichund*, 8 Moore P. C. C. 4; *East India Co. v. Paul*, 7 Moore P. C. C. 85.

(2) *Don v. Lippmann*, 5 Cl. & F. 1; *Fergusson v. Fyffe*, 8 Cl. & F. 140; *Huber v. Steiner*, 2 Bingh. N. C. 202, 210; S. C. 2 Scott, 304; *Cooper v. Waldegrave*, 2 Beav. 284; *British Linen Co. v. Drummond*, 10 B. & C. 903; *Bury v. Goldner*, 1 D. & L. 834; *Harris v. Quine*, L. R. 4 Q. B. 653; 10 B. & S. 644; 38 L. J. Q. B. 331; *The Alliance Bank of Simla v. Carey*, 5 C. P. D. 429; *Finch v. Finch*, 45 L. J. Ch. 816.

(3) *Wainford v. Barker*, 1 Ld. Raym. 232. See *Courtenay v. Williams*, 3 Hare, 551; *Poole v. Poole*, L. R. 7 Ch. 17; *In re Milnes*, 53 L. T. 534.

(4) *Spears v. Hartly*, 3 Esp. 81; and see *Richards v. Curlewis*, 3 Eq. Rep. 278.

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Summary
jurisdiction
of Court
over
solicitors.

a subsisting lien on the judgment (1). The same principle applies to the lien of a solicitor on deeds in his possession (2).

Where an order was made for the delivery to the client by a solicitor of a "bill of his fees and disbursements in all suits, causes, or other matters of business in which he has been employed as the attorney or solicitor for the applicant," and for a reference to the taxing-master to tax "the said bill," and for payment of the sum certified to be "due" from the client to the solicitor, or from the solicitor to the client, it was held that the taxing-master ought to tax all the items of the bill, without regard to the Statute of Limitations (3). So, where a client has a claim upon a solicitor for moneys recovered in an action, and received by the solicitor on his behalf, more than six years before the application to the Court, the statute is no bar to the recovery of the money by the client from the solicitor by means of the summary jurisdiction of the Court (4). But where a client voluntarily paid money to an attorney under an agreement in itself void for champerty, and an application was made to the Court after a lapse of thirteen years to compel the attorney to refund or deliver his bill, the Court refused to interfere, there being no explanation of the delay in applying (5). The Court will not in the exercise of its summary jurisdiction interfere so as to prevent a solicitor pleading the statute in an action brought against him by the client (6). Nor will the Court interfere where the client has already sued the solicitor and the action has failed on the ground that the claim was barred by statute (7). And no order

(1) *Higgins v. Scott*, 2 B. & Ad. 413.

(2) *In re Broomhead*, 5 D. & L. 52.

(3) *Curwen v. Milburn*, 42 Ch. D. 424.

(4) *Ex parte Sharp*, 1 Jur. 405; 5 Dowl. 717.

(5) *Ex parte Yeatman*, 4 Dowl. 304; 1 H. & W. 510.

(6) *In re Triston*, 1 L. M. & P. 74.

(7) *Sittingbourne and Sheerness Railway Co. v. Lawson*, W. N. (1886) 76; 80 L. T. newspaper, 24 Apr. 1886, p. 448.

can be made under sect. 28 of the Solicitors' Act, 1860 (1), making a solicitor's costs in a suit a charge on the property recovered or preserved in any case in which the right to recover payment of such costs is barred by any Statute of Limitations.

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CH. I.
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The right of action against a surety will generally arise at the same time as the right of action against the principal debtor; and the surety will therefore be entitled to the protection of the statute at the same time as the principal debtor. But the liability of the surety is not discharged by the neglect of the creditor to sue the principal debtor till the statute has run (2). Where the creditor had in his hands securities of the surety for the guaranteed debt, it was held that he was entitled to hold them though time had run in favour of the principal debtor (3).

Creditor
and surety

In *Rose v. Gould* (4), where a testator bequeathed his property to his children equally, but subject to the condition that if it appeared by his ledger that any one of his children was indebted to him, the amount of the debt should be deducted from such child's share, it was held that a debt appearing in the ledger, though barred by statute, ought to be deducted.

Debts still
due.

In the case of *Ingle v. Richards* (5), one of the executors named in a will was indebted to the testator on a promissory note; the other executors proved at once, but the executor indebted did not prove till after the death of the other executors, and more than six years after the testator's death. It was held in an administration suit that although, if the executor so indebted had never proved at all, no person could have recovered from him the money due on the note, yet the proving by him related

Debt due
from
executor.

(1) 23 & 24 Vict. c. 127.

(2) Per Lindley, L.J., *Carter v. White*, 25 Ch. D. at p. 672.

(3) *Carter v. White*, 25 Ch. D. 666.

(4) 15 Beav. 189.

(5) 28 Beav. 366.

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CH. I.
—Debts in
bank-
ruptcy.

back to the testator's death, and therefore the executor was held liable to account for the sum due on the note as assets in his hands. Lord Romilly, M.R., went on to order the payment of interest on the sum from the date of proof, and said he treated it as a case of revivor of a debt barred by the statute; but it is hard to see how the proof by the executor could in any sense revive the debt.

On the same principle, namely, that a statute-barred debt is still a subsisting debt, if the debtor does not claim the benefit of the statute, it is for the most part not competent to any other person to set it up. Thus before the Bankruptcy Act, 1861 (1), if a petitioning creditor's debt was barred by the statute at the time of the petition, the bankrupt might oppose the adjudication on that ground; but if he did not, a debtor of the bankrupt could not, in an action by the assignees, object on that ground to the validity of the adjudication, nor could any of the other creditors afterwards dispute the debt (2); but any creditor as well as the assignees could oppose the proof of any other creditor's debt under the bankruptcy, on the ground that it was barred by the statute at the time of adjudication (3); and Macan, J., in the Irish case of *In re Clendinning* (4), seems to have thought that it was the duty of the assignees as trustees for the creditors to claim the benefit of the statute. In England, by the 97th section of the Bankruptcy Act, 1861 (5), no debts barred by any Statute of Limitations could be reckoned as debts for the purposes of any petition under that Act. The Bankruptcy Act, 1861,

(1) 24 & 25 Vict. c. 134.

(2) *Quantock v. England*, 5 Burr. 2628; *Ex parte Dewdney*, 15 Ves. 479; *Ex parte Roffey*, 19 Ves. 468; *Mavor v. Pyne*, 3 Bingham. 285; *Gregory v. Hurrill*, 5 B. & C. 341; S. C. 8 D. & R. 270; *Jellis v. Mountford*, 4 B. & Ald. 256; *In re Clendinning*, 9 Ir. Ch. R. 284. See *Smallcombe v. Bruges*, McClelland, 45; *Middleton v. Mucklow*, 10 Bingham. 401; *Cooke's Bankruptcy Law*, 15, 6th ed.

(3) *Smallcombe v. Bruges*, McClelland, 45.

(4) 9 Ir. Ch. R. 284.

(5) 24 & 25 Vict. c. 134.

was repealed (1), and the Bankruptcy Act, 1869 (2), substituted for it; the Bankruptcy Act, 1869, was in turn repealed by the Bankruptcy Act, 1883 (3); but neither the Act of 1869 nor the Act of 1883 contains any such provision as the 97th section of the Act of 1861. By sect. 6, subs. 1 (b) of the Bankruptcy Act, 1883, now in force, a creditor is not entitled to present a bankruptcy petition against a debtor unless the debt is a liquidated sum payable either immediately or at some future time; by sect. 37, subs. 3, all debts and liabilities, with certain exceptions not material for the present purpose, "to which the debtor is subject at the date of the receiving order," shall be debts provable in bankruptcy. It would seem that the law before the Bankruptcy Act, 1861, still governs the cases of statute-barred debts, and that no statute-barred debt can be the foundation of a bankruptcy petition (4), or can be proved in bankruptcy, if objected to; but that the objection, if not taken in the bankruptcy, cannot afterwards in any action arising out of the bankruptcy be taken for the purpose of questioning the validity of the bankruptcy.

It is believed never to have been decided whether statute-barred debts were to be reckoned in computing the "value" of debts in order to calculate the proportion of creditors assenting to a composition under the 192nd section of the Bankruptcy Act of 1861 (5), or the 126th section of the Bankruptcy Act of 1869 (6). But by the Bankruptcy Acts, 1883 (7), s. 18, and 1890 (8), s. 3, subs. 2, such a composition must have the assent of the majority of creditors "who have proved;" and creditors whose debts are statute-barred would be excluded from

Debts
barred not
reckoned in
composition.

(1) See 32 & 33 Vict. c. 83, s. 20.

(2) 32 & 33 Vict. c. 71.

(3) 46 & 47 Vict. c. 52, s. 169.

(4) *Ex parte Tynte. In re Tynte*, 15 Ch. D. 125.

(5) 24 & 25 Vict. c. 134.

(6) 32 & 33 Vict. c. 71.

(7) 46 & 47 Vict. c. 52.

(8) 53 & 54 Vict. c. 71.

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the calculation unless they have been allowed to prove without objection (1).'

If a creditor whose debt is statute-barred has a lien on the property of the debtor, his lien is not affected by the bankruptcy of the debtor (2).

Executor
may pay
debts
barred.

Upon the principle that a debt barred by the statute is still a subsisting debt, an executor or administrator commits no *devastavit* by paying such a debt, and is not bound to plead the statute (3); this is well settled, and a dictum of Bayley, J., to the contrary effect (4) has been expressly disapproved of by Wood, V.-C. (5), and by Bowen, L.J. (6).

An executor may, in the exercise of his discretion, pay a statute-barred debt, notwithstanding that the personal estate of the testator is insufficient to pay all his debts, and the executor will be allowed the payment as against the devisees of the real estate upon which the other debts are in consequence thrown (7).

Who may
set up the
statute in
adminis-
tration
actions.

Questions, however, have arisen how far in administration actions parties interested in the estate can set up the statute against claims brought in under the decree, although the executors refuse to interfere. The result of the cases (8) seems to be as follows:—

(a) In all administration actions, whether creditors' actions or not, any person interested being a party to the action or coming in as a creditor or otherwise under the decree can raise the objection to any claim brought

(1) See *In re Hepburn. Ex parte Smith*, 14 Q. B. D. at p. 400.

(2) Bankruptcy Act, 1883, s. 9, subs. 2.

(3) *Norton v. Frecker*, 1 Atk. 524; *Castleton v. Fanshaw*, Prec. Chanc. 99; 1 Eq. Cas. Abr. 305.

(4) *McCulloch v. Dawes*, 9 D. & R. 43.

(5) *Hill v. Walker*, 4 K. & J. 166; and see *Hunter v. Baxter*, 3 Giff. 214.

(6) *In re Rowson. Field v. White*, 29 Ch. D. at p. 363.

(7) *Lewis v. Rumney*, L. R. 4 Eq. 451.

(8) *Ex parte Dewdney*, 15 Ves. 498; *Shewen v. Vanderhorst*, 1 Russ. & M. 347; 2 Russ. & M. 75; *Briggs v. Wilson*, 5 De G. M. & G. 12; *Moodie v. Bannister*, 4 Drew. 432; *Fuller v. Redman* (No. 2) 26 Beav. 618. See *Phillips v. Deal* (No. 2), 32 Beav. 26; *Adams v. Waller*, 35 L. J. Ch. 727; 14 L. T. N. S. 727.

in under the decree. The same rule applies now to proceedings under R. S. C., Ord. LV. rr. 3, 4, where there is no administration order (1).

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(b) In a creditor's action, where time has run against the plaintiff's claim, neither a creditor nor a residuary legatee can come in and set up the statute against the plaintiff in respect of the claim on which the decree is founded; but

(c) Where the suit is for the administration of the real as well as of the personal estate, any person interested in the real estate who would have been a necessary party but for the provisions of R. S. C., 1883, Ord. XVI. r. 8 and rr. 33–38 (2) (which have been substituted for sect. 42 of 15 & 16 Vict. c. 86, now repealed), can take the objection against the plaintiff.

No payment made by an executor after decree will be allowed him in his accounts; but he is entitled, in taking the account, to stand in the place of any creditor whom he may so pay in respect of the debt paid (3). Therefore, if an executor after decree pay a debt barred by statute, any party who could have set up the statute against the creditor, had he come in under the decree, would be able to set it up in the same manner against the executor. After decree an executor can do no act to vary the rights of the parties, so that an acknowledgment of a debt by an executor after decree is void as against the parties interested in the estate (4).

An order in an administration action under R. S. C., 1883, Ord. xv. r. 1 (5), merely for an account by an executor, and reserving further consideration, does not affect the right of creditors to sue the executor or the executor's right to prefer creditors (6). In an adminis-

(1) *In re Wenham*. *Hunt v. Wenham* (1892), 3 Ch. 59.

(2) See R. S. C. Ir. 1891, O. XVI. r. 8 and rr. 33–38.

(3) *Jones v. Jukes*, 2 Ves. 518; *Mitchelson v. Piper*, 8 Sim. 64.

(4) *Phillips v. Beal* (No. 2), 32 Beav. 26.

(5) R. S. C. Ir. 1891, O. xv. r. 1.

(6) *In re Barrett*. *Whilaker v. Barrett*, 43 Ch. D. 70.

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tration suit where all the next of kin but one were before the Court, and both they and the administratrix declined to take advantage of the statute against the creditors coming in under the decree, Lord Romilly, M.R., decided that the objection should not be raised by the Court on behalf of the absent next of kin, but intimated that the administratrix acted at her own risk and not under the sanction of the Court (1).

Statute
pleaded by
heir or
executor
alone.

Where, in an administration action, the parties interested in the realty of a deceased debtor set up the statute, but those interested in the personalty do not, the personalty remains liable to the debt, but the realty is freed (2). But, since the personalty is the primary fund for payment and would therefore in ordinary cases be liable to refund the amount of any debt paid out of the realty, there is greater difficulty in deciding what is the consequence when the owner of the realty does not set up the statute, but the personal representative does. A similar difficulty arises when one out of several devisees omits to plead the statute, since, as a general rule, such a devisee would, if compelled to pay the whole of a debt, have a right of contribution against the devisees of other parts of the testator's estate. It has been argued that the right to have the amount refunded or to require contribution not only is not destroyed, but preserves to the creditor a right to recover directly from those from whom, by this indirect process, the money would eventually come—that is, from the very persons who have pleaded the statute. It was, however, decided in the case of several devisees that the creditor's right is not kept alive against those who have set up the statute, and on the same principle it would seem that no such right would remain against an executor. A strong opinion was also expressed that the right to con-

(1) *Alston v. Trollope*, L. R. 2 Eq. 205.

(2) *Fordham v. Wallis*, 10 Hare, 217; 22 L. J. Ch. 548.

tribution itself was gone (1). It would seem from the decree in *Fordham v. Wallis* that if a testator has devised his land in settlement or to various specific devisees, those devisees only who plead the statute will get the benefit of it, and that such plea will not enure for the benefit of devisees taking under the will either different lands or other estates in the same land. Lord Cranworth, however, appears from his judgment in *Morley v. Morley* (2) to have been of a different opinion, and if the view suggested below (3) is correct—namely, that the liability of all the real estate of a deceased debtor to satisfy his simple contract debts is indivisible—then it must be considered doubtful whether the authority of *Fordham v. Wallis* on this point is conclusive.

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Not only may the executor pay a debt of the testator to which the statute might have been pleaded, but the executor's right of retainer extends to statute-barred debts, and that even after judgment in an administration action, and although he has paid the assets into Court without previously asserting his right (4). In a suit by a legatee to obtain payment of the legacy out of the assets of the testator, it was held that an executor might retain so much of the legacy as was sufficient to satisfy a debt due from the legatee to the testator at the time of his death, although the remedy for the debt was at the time of the death barred by the statute. This was decided on the same ground as the cases upon lien—namely, that the debt itself not being discharged, if the creditor has any means other than an action for recovering his debt, he is at liberty to pay himself notwith-

Executor
may retain
debts
barred.

(1) *Fordham v. Wallis*, *ubi supra*. See *Byrne v. Duignan*, 3 J. & Lat. 116; 9 Ir. Eq. R. 295. See below, Part III. Ch. IV.

(2) 5 De G. M. & G. 610.

(3) See Part I. Ch. V.

(4) *Hopkinson v. Leach*, 1 Madd. Ch. Pr. 728, 3rd ed.; *Stahlschmidt v. Lett*, 1 Sm. & G. 415; *Sharman v. Rudd*, 4 Jur. N. S. 527; *Hill v. Walker*, 4 K. & J. 166.

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standing the statute (1). The executor has no right to retain a specific legacy as against a debt due from the legatee (2). An administrator is entitled to set off against the share of one of the next of kin in the intestate's estate the whole of a debt to the estate, part of which is statute-barred (3). An executor can retain out of a lapsed share of personalty which has come to one of the next of kin a statute-barred debt due to the testator's estate, but he has no power to retain such a debt out of a lapsed share of realty which has come to the heir, even though such realty has been devised to the executor for the purpose of conversion (4).

A creditor whose debt was statute-barred has been allowed to take out administration to his intestate debtor, but in that case the Court required that the administration bond should contain an obligation that the administrator would distribute the assets rateably without any preference of his own debt (5).

Set-off. The statutes (6) allowing the set-off of mutual debts were subsequent to the statute of James, but the Courts have determined that set-off is within the equity of the statute, and a plaintiff can take advantage of the statute if he replies it to a defence of set-off in the same manner as a defendant pleads it in a defence (7).

Crown not bound by statute. The Crown is not affected by the statute of James, and therefore if a debt not barred by statute is vested in the Crown, it will never be barred as against the

(1) *Courtenay v. Williams*, 3 Hare, 539; 15 L. J. Ch. 204. See *Smith v. Smith and Jeavons*, 7 Jur. N. S. 1140; 3 Giff. 263; *Coates v. Coates*, 33 Beav. 249; 33 L. J. Ch. 448; *In re Akerman. Akerman v. Akerman* (1891), 3 Ch. 212.

(2) *In re Akerman. Akerman v. Akerman* (1891), 3 Ch. 212.

(3) *In re Cordwell's Estate. White v. Cordwell*, L. R. 20 Eq. 644.

(4) *In re Milnes. Milnes v. Sherwin*, 53 L. T. 534.

(5) *Coombs v. Coombs*, L. R. 1 P. & D. 288.

(6) 2 Geo. II. c. 22, s. 13; 8 Geo. II. c. 24, s. 4. See now R. S. C. 1883, O. XIX., r. 3; R. S. C. Ir. 1891, O. XIX. r. 3.

(7) *Remington v. Stevens*, 2 Strange, 1271; *Rawley v. Rawley*, 1 Q. B. D. 460.

Crown, but a debt already barred will not be revived by becoming vested in the Crown (1).

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When the time has once begun to run, it will continue to do so, even should subsequent events occur which render it an impossibility that an action should be brought. This rule holds good alike of all the Statutes of Limitations (2). It was even decided in *Prideaux v.*

If time
begins
running, it
continues.

Webber (3) that a plaintiff was barred by the statute, although during the latter part of the six years the Courts were closed in consequence of the rebellion. One exception has been grafted on this rule—namely, where the administration of the estate of a person liable to be sued has been granted to the person in whom the right of action is vested; this, being an act of law, suspends the remedy, and therefore the operation of the statute (4).

Exception.

(1) *Lambert v. Taylor*, 4 B. & C. 138. See *post*, Part VII. Ch. I.

(2) *Homfray v. Scroope*, 13 Q. B. 509, 512; *Hill v. Smith*, 1 Wils. 134; *Doe d. Duroure v. Jones*, 4 T. R. 300; *Rhodes v. Smethurst*, 4 M. & W. 42; *Howlett v. Lambert*, 2 Ir. Eq. R. 254. See *Skeffington v. Whitehurst*, 3 Y. & C. Exch. 34, 35; *Doe v. Shane*, 4 T. R. 306 n. b; *Stowel v. Zouch*, Plowd. 366; *Cotterell v. Dutton*, 4 Taunt. 826; *Gray v. Mendez*, 1 Strange, 556; *Wilcox v. Huggins*, 1 Barnardiston, 335, 2 do. 5; *Copley v. Dorkmincque*, 2 Lev. 166.

(3) 1 Lev. 31; and see 17 Ves. 93, and *Bynton's Case* cited in *Hall v. Wybourn*, 2 Salk. 420.

(4) *Seagrum v. Knight*, L. R. 2 Ch. 623.

CHAPTER II.

WHEN THE TIME BEGINS TO RUN.

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CH. II.

When the
time
begins to
run.

Breach of
executory
promises.

THE statute of James requires an action to be brought "within" so many "years after the cause of action or suit," except in the case of slander, where the action must be brought "within two years after the words spoken." For the purpose, therefore, of ascertaining the time when the statute begins to run, we must consider when the cause of action arises in each case. In assumpsit upon an executory promise, the cause of action is the breach and not the promise (1). If, therefore, the promise is to do anything at a future time, or upon the happening of a contingency, the cause of action arises at the time specified or upon the event happening (2). Thus a promise being to pay a debt, "whenever my circumstances enable me to do so, and I may be called on for that purpose," it was held that no demand was necessary, and that the statute ran from the time of the debtor being able to pay, although the plaintiff had made no demand, and had no knowledge or notice of the defendant's ability (3). So in the case of a promise to do anything upon request, the time runs from the request (4), except where the request is immaterial, as in

(1) *Gould v. Johnson*, 2 Salk. 422; 2 Ld. Raym. 838; *East India Co. v. Paul*, 7 Moore P. C. C. 85.

(2) *Fenton v. Emblers*, 3 Burr. 1278; S. C. 1 Wm. Bl. 353; *Waters v. Earl Thanet*, 2 Q. B. 757; *Hammond v. Smith*, 33 Beav. 452.

(3) *Waters v. Earl Thanet*, 2 Q. B. 757.

(4) *Webb v. Martin*, 1 Lev. 48; *Shutford v. Borough*, Godbolt, 437; S. C. *Shutford v. Penow*, Cro. Car. 139; *Bill v. Luke*, Hetley, 138.

the case of a promise to pay a debt on demand (1). Where the plaintiff having agreed to lend the defendant a sum of money sent to him on the 14th June a cheque payable to the defendant's order, and through the defendant's mistake the cheque was presented at the plaintiff's bank without being endorsed, and in consequence was not paid by the plaintiff's bankers till the 21st June, it was held that an action commenced on the 21st June six years afterwards was in time, as the loan was made not on the day when the cheque was handed over, but on the day when the money was paid (2). If a sub-tenant voluntarily pays to the head landlord rent due by the landlord of the sub-tenant, the sub-tenant's right to recover from the mesne landlord the sum so paid does not arise unless and until the payment is adopted by the mesne landlord, and the statute does not run against the sub-tenant's right until such adoption (3). Where, in an agreement for the repayment of an existing debt by instalments, there is a proviso that on default of payment of any instalment the whole debt should be immediately recoverable, then, inasmuch as upon the first default the creditor has an immediate right of action for the whole debt, the statute runs not as to each instalment from the time at which it ought to have been paid, but as to the whole debt from the time of the first default (4). On the same principle, if goods are sold on credit, the time runs not from the delivery of the goods, but from the time when the credit expires. Where a contract for the sale of goods was for six months' credit, the payment then to be made by a bill at two or three months, at the purchaser's option, it was held that an action for the price would not lie at the expiration of six months, and that time began to run from the

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Money
lent.

Goods sold
on credit.

(1) See below, p. 30.

(2) *Garden v. Bruce*, L. R. 3 C. P. 300; 37 L. J. C. P. 112.

(3) *Ahearne v. McSwiney*, 8 Ir. R. C. L. 568.

(4) *Hemp v. Garland*, 4 Q. B. 519; *Reeves v. Butcher* (1891) 2 Q. B. 509. See *Irving v. Veitch*, 3 M. & W. 90.

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expiration of eight or nine months, it being unnecessary to decide which. It was intimated that the only action that would lie after the expiration of the six months, and before the expiration of the eight or nine months, would be an action for breach of contract in not giving the bill (1).

Work
done.

So on a general contract for work to be done, the cause of action for the price accrues when the work is done (2). But where the special Act of a railway company incorporated the Companies Clauses Act (3), s. 65 of which enacts that "all the money raised by the company shall be applied, firstly, in paying the costs and expenses incurred in obtaining this special Act," and a solicitor sued the company for such costs fourteen years after the work was done, but within six years of the company's first having assets, it was held that the statute did not begin to run till the company had assets (4). And where the solicitor of a Joint Stock Company, after an order to wind up the company, delivered up documents to the official manager on the undertaking that the solicitor should be paid out of the first funds that should come to the hands of the official manager, and the solicitor delivered his bill nine years afterwards, no funds having till then come into the hands of the official manager, it was held that the claim was not barred by the statute (5). In an action against a factor for account, the time runs from demand only, the implied promise being to account on demand (6). So, in the case of a bill or note payable at a fixed time after date, the statute runs only from the time at which the bill or note becomes due, even although the action is for money lent

Bills of
exchange.

(1) *Helps v. Winterbottom*, 2 B. & Ad. 431.

(2) Per Parke, B. *Emery v. Day*, 1 C. M. & R. 245. See *Hyde v. Partridge*, 2 Ld. Raym. 1204.

(3) 8 & 9 Vict. c. 16.

(4) *In re Kensington Station Act*, L. R. 20 Eq. 197.

(5) *In re Gloucester, &c., Railway Co.*, 2 Giff. 47.

(6) *Topham v. Braddick*, 1 Taunt. 572.

for which the note is a security (1), because the money does not become payable till the time has expired. If, however, the bill be payable at sight, the statute runs from the presentment (2), but if payable at a specified period after sight or demand, the statute does not run till the expiration of such period (3). A bill payable at sight must be presented within a reasonable time (4), but as between the holder and the drawer, no time less than six years is unreasonable for presentment, unless some loss be occasioned to the drawer by the delay (5). But where presentment is unnecessary (6), the statute runs from the time when the holder first became aware of some fact that makes presentment unnecessary, *e.g.* that the drawer had no means of meeting the bill (7). Where a defendant accepted a bill in blank which was not filled up for twelve years, it was held that he was liable at the suit of an innocent holder for value, and that time did not begin to run till the bill became due as filled up (8). In the case of *In re Bethell, Bethell v. Bethell* (7), a debtor drew a cheque, gave it undated to a creditor, and told the creditor that he would let the creditor know when he had completed a loan from which he expected to get sufficient money to meet the cheque, and that the creditor was then to fill in the cheque and obtain payment; the debtor afterwards informed the creditor that he could not complete the loan; it was held that the creditor could not prevent the statute from

(1) *Wittersheim v. Countess of Carlisle*, 1 Hy. Bl. 631; *Buckler v. Moor*, 1 Mod. 89.

(2) *Dixon v. Nuttall*, 1 C. M. & R. 307; *Holmes v. Kerrison*, 2 Taunt. 323; *In re Boyse. Crofton v. Crofton*, 33 Ch. D. 612.

(3) *Thorpe v. Booth*, Ry. & Moo. 388; and see *Moore v. Petchell*, 22 Beav. 172.

(4) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 40.

(5) *Laws v. Rand*, 27 L. J. C. P. 76; *Robinson v. Hawksford*, 9 Q. B. 52.

(6) See *Terry v. Parker*, 6 A. & E. 502; *Wirth v. Austin*, L. R. 10 C. P. 689; Bills of Exchange Act, 1882, s. 46.

(7) *In re Bethell. Bethell v. Bethell*, 34 Ch. D. 561.

(8) *Montague v. Perkins*, 17 Jur. 557; 22 L. J. C. P. 187.

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running by not filling in the date, but that the statute ran from the time when the creditor was informed that the debtor could not complete the loan. In the last-mentioned case of *In re Bethell*, it should be observed, the creditor had only a limited authority to fill in the date, while in the previous case of *Montague v. Perkins* (1) the creditor's authority was unlimited. If a bill or note be made payable on demand, the statute runs from the date of making or accepting, because the bill or note is payable immediately, and no demand is necessary (2). And the same rule applies to any promise to pay on demand (3). Nor will it make any difference in this respect that the debt is to be repaid with simple (4) or even with compound (5) interest.

Cheques.

A cheque is a bill of exchange drawn on a banker payable on demand (6); and if a cheque be duly presented and dishonoured, an action will lie against the drawer for breach of the implied promise, that the cheque would be paid on presentment at the bank on which it is drawn. As no such action will lie without presentment, unless there are special circumstances which render presentment unnecessary, it might seem that the holder of a cheque by delaying to present it might postpone the accrual of the right of action for an unlimited time, and that therefore the drawer of a cheque might be sued for the amount any number of years afterwards. But it is apprehended that the implied contract on the drawing of a cheque is only that it will be paid by the banker if presented in a reasonable time, and therefore that if a cheque is not presented until more than a reasonable time has elapsed, no cause of

(1) *Montague v. Perkins*, 17 Jur. 557; 22 L. J. C. P. 187.

(2) *Christie v. Fonsick*, 1 Selw. N. P. 301 (13th ed.); *Rumball v. Ball*, 10 Mod. 38; *In re George. Francis v. Bruce*, 44 Ch. D. 627.

(3) *Collins v. Benning*, 12 Mod. 444. See *re Brown*, 37 Sol. J. 354.

(4) *Norton v. Ellam*, 2 M. & W. 461.

(5) *Jackson v. Ogg*, Johns, 397.

(6) Bills of Exchange Act, 1882, s. 73.

action accrues upon payment being refused, and the holder can only sue upon the original consideration for which the cheque was given, or on the new promise to pay which arises on the cheque being given for an existing debt.

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Where a note payable on demand was deposited with a banker for delivery to the payee on his producing another note cancelled, it was held that the payee had no cause of action till the note was delivered to him by the banker, and that the statute only ran from that time (1).

Where a bill or note is not payable on demand, but, on the expiration of a certain specified period, three days of grace are (unless the bill or note otherwise provides) to be added to the period fixed for payment, and the bill or note falls due on the last of these three days. The cause of action accrues on the last day of grace, and the time begins to run then. If the last day of grace fall on a Sunday, Christmas Day, Good Friday, or public fast or thanksgiving, the bill is due and payable, and the cause of action therefore accrues on the preceding business day (2). If the last day of grace is a Bank Holiday (under the Bank Holidays Act, 1871), other than Christmas Day, or Good Friday, or is a Sunday, and the second day of grace is a Bank Holiday, the bill is due and payable, and the cause of action accrues on the business day following the last day of grace (3). When the last day of the six years or other period of limitation is a Sunday or other day on which an action cannot be commenced, the action must be commenced on the preceding business day, or it will be too late (2). And R. S. C. 1883, Ord. LXIV. r. 3 (4) does not apply to the commencement of such an action (2).

(1) *Savage v. Aldren*, 2 Stark. 232.

■ (2) *Morris v. Richards*, 45 L. T. 210.

(3) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 14 (a) and (b).

(4) R. S. C. Ir. 1891, O. LXIV. r. 3.

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they were not to apply to A. until failure of their utmost efforts and legal proceedings against B. In March, 1820, in consideration of the plaintiffs giving B. two years for payment, A. reserved to them their claim against himself under the former guarantee, in case they should not be paid at the expiration of that period. B. went abroad in 1824; process was issued against him in 1826 and continued till 1830, when he returned; the plaintiffs then arrested him, and he took the benefit of the Insolvent Act. In 1828 the plaintiffs sued A. on his guarantee. A. died in 1829, and an action was then brought against his executors which was not tried till after B. became insolvent; the defendants set up the statute, and it was held to be a good defence, as the plaintiffs' right of action against A. accrued at the expiration of the two years' time given to B.—that is, in March, 1822, and the action ought to have been brought within six years of that time.

Guarantee
of current
account.

A joint and several promissory note payable on demand was given by A. and B. to a banking company on the 4th of December, 1855, and by a memorandum of the same date it was declared that the note was intended as a security for an account to be opened by B. with the banking company, and in case of the company suing on the note, the production of the note was to be conclusive evidence that the amount claimed was owing from B. On the 31st of December, 1855, B. was indebted to the company, but no balance was struck till June, 1856. It was held that an action against A. commenced in March, 1862, was not defeated by the statute (1).

Action
against
drawer of
a bill.

If a bill of exchange is dishonoured by non-acceptance, an action lies against the drawer at the suit of the payee, immediately upon the latter giving notice of the non-acceptance (2); hence, when a foreign bill has been

(1) *Hartland v. Jukes*, 1 H. & C. 667; 32 L. J. Exch. 162.

(2) *Milford v. Mayor*, 1 Doug. 55; *Hickling v. Hardey*, 7 Taunt. 312.

dishonoured by non-acceptance, and duly protested and notice given, the statute begins to run immediately notice is given, not from the time at which the bill would have become due (1). In *Webster v. Kirk* (2) the plaintiffs were payees of bills of exchange, drawn by the defendant, which they had indorsed over. The bills became due in 1843, and were dishonoured: in 1847 the plaintiffs were sued by the indorsees, and ultimately, in 1851, were compelled to pay the amount; the plaintiffs then sued the defendant, but the statute was held to be a bar. An unsuccessful attempt in this case was made to show that the plaintiffs were merely accommodation parties, and it seems to have been admitted that, if that contention failed, the plea of the statute was good, time running from the dishonour. The same rule must hold good in an action between an indorsee and any prior holder.

On the principles laid down above, as to the right of a surety to sue a co-surety or the principal debtor, it would appear that if the heir or devisee of a deceased debtor has been compelled to pay a simple contract debt of the deceased, time will begin to run against his right to recover the amount out of the personalty as soon as he has made the payment, and if one of several devisees has paid such a debt, time will run against his right to obtain contribution from the other devisees as soon as he pays more than his proportion.

Payment
of debt by
heir or
devisee.

The liability of a husband for the ante-nuptial debts of his wife accrues to him on his marriage, but the cause of action is the indebtedness of the wife, and the statute runs in his favour as well as in favour of the wife; and the Married Women's Property Act, 1882 (3), has made no difference in this respect; and if a husband is sued under sects. 14 & 15 of that Act, for an ante-

Husband's
liability
for ante-
nuptial
debts of
his wife.

(1) *Whitehead v. Walker*, 9 M. & W. 506.

(2) 17 Q. B. 944; 21 L. J. Q. B. 159.

(3) 45 & 46 Vict. c. 75.

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—Partner-
ship.

nuptial debt which accrued due against the wife more than six years before the action against the husband, the statute is a good defence to him as well as to her (1).

On the dissolution of a partnership, the statute begins to run against a claim brought by one of the former partners against another from the time of the dissolution (2). As between a surviving partner and the representatives of a deceased partner, the statute begins to run at the date when the partnership estate is vested in the surviving partner (3).

Conse-
quential
damage.

In all actions on promises, as we have seen, the statute runs not from the making of the promise, but from the breach, the breach being the cause of action, or the gist of the action, as it has been called. Consequential damage arising from the breach gives no new cause of action; it is admissible in evidence on the question of damages, but in an action for breach of contract, even if no consequential damages are proved at all, the plaintiff would still be entitled to a verdict. This appears clearly from the decision in *Battley v. Faulkner* (4). In that case the plaintiffs contracted to purchase spring wheat from the defendants, who, in 1810, delivered winter wheat instead. The plaintiffs re-sold the wheat as spring wheat, and in 1811 were sued by the persons who bought from them, and after an action which lasted seven years, had, in 1818, to pay damages. The plaintiffs at the commencement of the action gave notice to the defendants of what had happened, and in 1818, after they had been compelled to pay damages, sued the defendants, contending that the statute began to run from the time when the damages were paid, but it was held that it began to run from the time of the delivery of the wheat. And this principle holds good, even if the plaintiffs are ignorant of the

(1) *Beck v. Pierce*, 23 Q. B. D. 316.

(2) *Noyes v. Crawley*, 10 Ch. D. 31.

(3) *Knox v. Gye*, L. R. 5 H. L. 656.

(4) 3 B. & Ald. 288.

breach, till after the expiration of the statutory period (1). Where the discovery of the cause of action is prevented by the fraud of the defendants, the case is different. Before the Judicature Act, 1873, there was a variance in this respect between courts of law and courts of equity. After some difference of opinion (2), the courts of common law decided that no such fraud on the part of the defendants would form an exception to the general principle that the statute runs from the time when the cause of action accrues (3). But in equity, if the bill charged fraud, and that it was not discovered till within the prescribed period, the statute was held to run from the time of discovery only; and the fact of a plaintiff being so deprived of his remedy at law, through the fraud of the defendant, of itself, as it appears, gave jurisdiction to a court of equity to enforce a claim as to which the remedy would otherwise have been at common law only (4). Now by the 11th subs. of s. 25 of the Judicature Act, 1873, "Generally in all matters, not hereinbefore particularly mentioned in which there is any conflict or variance between the rules of equity and the rules of common law, with reference to the same matter, the rules of equity shall prevail." The effect of this section would appear to be that in all cases, as to which, before the Judicature Act, 1873, there was a concurrent remedy, both in law and equity, the equitable rule will prevail; and in all such cases, but, it seems, only in such

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Discovery
of cause
of action
prevented
by fraud.

(1) *Bree v. Holbech*, 2 Dougl. 654 a; *Whitehead v. Howard*, 2 Bro. & B. 372; *Short v. McCarthy*, 3 B. & Ald. 626; *Howell v. Young*, 5 B. & C. 259; *Hughes v. Twisden*, 55 L. J. Ch. 481; and see *Smith v. Fox*, 6 Hare, 386; *Brown v. Howard*, 2 Bro. & B. 73. See also *Sims v. Brutton*, 5 Exch. 802; 20 L. J. Exch. 41; *Wood v. Jones*, 61 L. T. 551; *Bean v. Wade*, Cab. & E. 519.

(2) *Clark v. Hougham*, 2 B. & C. 149; *Bree v. Holbech*, 2 Dougl. 654 a.

(3) *Imperial Gas Co. v. London Gas Co.*, 10 Exch. 39; 23 L. J. Exch. 303; *Hunter v. Gibbons*, 1 H. & N. 459; 26 L. J. Exch. 1.

(4) *Booth v. Lord Warrington*, 4 Bro. P. C. 163; *South Sea Co. v. Wymondsell*, 3 P. Wms. 143; *Hovenden v. Annesley*, 2 Sch. & Lefr. 634; *Blair v. Bromley*, 5 Hare, 542; 2 Phill. 354. And see *Ex parte Bolton*, 1 Mon. & Ayr. 60.

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cases, a reply to a plea of the statute that the cause of action was fraudulently concealed by the defendant until within six years of action brought would now be held good in all courts (1).

Where an annuity purchased is set aside.

When the grantor of an annuity which had been set aside was sued by the purchaser, the cause of action being the failure of consideration by the setting aside of the annuity, the statute was held to run not from the time of the granting of the annuity or from the last payment in respect of it, but from the time at which it was set aside (2). The question is left open from what time the statute would run if the annuity were not merely voidable, but void *ab initio*.

Action for solicitor's costs.

When a solicitor is retained to carry on an action or a particular business, he contracts to carry it on to its termination; so that if a solicitor discontinue an action or refuse to proceed with it, without notice to the client, unless under peculiar circumstances which would justify such a course, the solicitor would have no right of action for his costs (3), nor can the solicitor at common law bring an action for any part of the costs during the continuance of the business. Whatever, therefore, may be the date of the items in the bill, the statute begins to run against all from the date of the termination of the action or the continuous business, or of the same being properly discontinued by the solicitor (4). The solicitor's right to sue for costs in an action accrues generally when final judgment is given, if he prosecutes the action to judgment; but, if there is an appeal from the judgment, the solicitor cannot sue for his costs till the appeal is decided, and the statute does not

(1) *Gibbs v. Guild*, 8 Q. B. D. 296; 9 Q. B. D. 59. And see *Barber v. Houston*, 14 L. R. Ir. 273; 18 L. R. Ir. 475; *Armstrong v. Millburn*, 54 L. T. 247, 723, and *post*, Part VIII. Ch. I.

(2) *Cowper v. Godmond*, 9 Bingh. 748; *Huggins v. Coates*, 5 Q. B. 432.

(3) *Nicholls v. Wilson*, 11 M. & W. 106.

(4) *Harris v. Osbourn*, 2 C. & M. 629; *Martindale v. Falkner*, 2 C. B. 706; *Whitehead v. Lord*, 7 Exch. 691; 21 L. J. Exch. 239.

begin to run against him till then (1). But when judgment has been given and there is no appeal, the statute begins to run, and subsequent items within the six years incidental to the business of the action will not take the earlier items in the bill out of the statute (2). It has been decided that the common law rule is not applicable to long and complicated proceedings in the Chancery Division or in Bankruptcy; and both Jessel, M.R., and the Court of Appeal have held that in such actions a solicitor may during the course of an action deliver separate bills, and that an application to tax a bill delivered more than twelve months before the application will not be granted even though a bill in the same business has been delivered within the twelve months (3). It would seem that in such cases the statute would run against the solicitor from the time when he delivered his bill, but that he might at his option treat the whole business, however long, as one contract (4), and that in such a case the statute would not run against him until the final termination of the business. In *Baile v. Baile* (5), which related to the costs of a solicitor in a suit (*inter alia*) for the appointment of a receiver, it was held by Wickens, V.-C., that the statute did not run against the solicitor while proceedings were going on with the solicitor's name on the record and while the receiver was in possession, although the solicitor himself had taken no steps within six years. Where the plaintiff was employed in several transactions and *inter alia* to procure a transfer of a mortgage, some items relating to that matter were before and some within the six years; there was no evidence to show that all these items

(1) *Harris v. Quine*, L. R. 4 Q. B. 653; 10 B. & S. 644; 38 L. J. Q. B. 331.

(2) *Rothery v. Munnings*, 1 B. & Ad. 15.

(3) *In re Hall and Barker*, 9 Ch. D. 538. *In re Nelson, Son and Hastings*, 30 Ch. D. 1.

(4) *In re Cartwright*, L. R. 16 Eq. 469.

(5) L. R. 13 Eq. 497.

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were under one contract, except the bill itself, and the language of the bill was against it. It was held that the items dated more than six years from the beginning of the action were barred (1).

Action
against
solicitor
for
negligence.

In an action against a solicitor for negligence where there is no fraud, the statute runs from the date of the negligent act being completed, and not from the discovery or from the occurring of the damage (2).

Loss of
ship by
barratry.

In an action on a policy of assurance by the owners of a ship against the underwriters for loss occasioned by barratry on the part of the captain in having taken the ship out of her course and procured her to be condemned and sold, it was held that the barratry was not complete until the delivery to the purchaser, and that the statute would not begin to run till then (3).

Action for
use and
occupation.

The statute is a good defence to an action for use and occupation, and for breach of agreement to repair brought by a landlord against a person who has once been his tenant from year to year, but who has not within the last six years occupied the premises, paid rent or done any act from which a tenancy could be inferred, although the tenancy has not been determined by a notice to quit (4). In the case last referred to, the action was brought against the executor of the original or supposed original tenant, and the executor had actually gone into occupation and paid rent since the death of his testator; but it would seem that nothing really turned upon this, and that the case would have been decided in the same way had the original tenant been the person who had abandoned the tenancy and who had been sued.

Agreement
not to sue
for a time.

It was held in equity that where there was a provision made by a debtor for the payment of his debts out of

(1) *Phillips v. Broadley*, 9 Q. B. 744.

(2) *Howell v. Young*, 5 B. & C. 259; *Short v. McCarthy*, 3 B. & Ald. 626; *Smith v. Fox*, 6 Hare, 386; *Hughes v. Twisden*, 55 L. J. Ch. 481; *Bean v. Wade*, Cab. & E. 519; *Wood v. Jones*, 61 L. T. 551.

(3) *Hibbert v. Martin*, 1 Camp. 538.

(4) *Leigh v. Thornton*, 1 B. & Ald. 625.

certain specific life interests, and the creditors covenanted not to sue till the life interests had determined, the creditors could sue at any time within six years after their determination (1); but a mere letter of licence by creditors to their debtor has been held to have no such effect (2). It is believed that this point has never been decided at law, but it may be observed that a covenant not to sue does not extinguish an action at law, and that in general a personal action could not be suspended, because if once suspended it was altogether gone (3). Where, however, a negotiable instrument is taken in payment of a debt, the cause of action is suspended till dishonour (4). And in one case (5) an arrangement between the parties was held to be an agreement that payment would be accepted in a particular way, and that in default the plaintiff should be remitted to his original cause of action, so as to give a fresh right of action upon the original cause when such default was made, so that time did not begin to run till then. A covenant not to sue could not before the Judicature Act, 1873, form the ground of a legal plea in bar to an action, though it might have been made use of by way of a plea on equitable grounds. So it would seem that a covenant not to sue for a limited time could only before the Judicature Act, 1873, have been made available as an answer to a plea of the statute by a replication on equitable grounds.

Where, before the Judicature Act, 1873, the declaration in an action brought more than six years after the original cause of action stated that an agreement had been made between the plaintiff and defendant that, in consideration of the forbearance of the plaintiff and of

Such an agreement unperformed by the defendant.

(1) *O'Brien v. Osborne*, 10 Hare, 92; *Iven v. Elwes*, 3 Drew. 25.

(2) *Fuller v. Redman* (No. 2), 26 Beav. 614.

(3) *Ford v. Beech*, 11 Q. B. 852; *Belshaw v. Bush*, 11 C. B. 191; 22 L. J. C. P. 24; but see *Slater v. Jones*, L. R. 8 Exch. at p. 192.

(4) 2 Wms. Saund. 351 n. (e); *Belshaw v. Bush*, 11 C. B. 205; 22 L. J. C. P. 24; *Turney v. Dodwell*, 3 E. & B. 136, 140; 23 L. J. Q. B. 137.

(5) *Irving v. Veitch*, 3 M. & W. 90.

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the defendant being allowed to make some clothes for the plaintiff's servant in part discharge of the debt, the defendant would pay the balance of the original debt in a reasonable time, it was held on demurrer to a plea of the statute that the agreement was nothing more than an agreement for an accord in equity, which would not have prevented the plaintiff from suing on the original cause of action, that the original debt was not extinguished, and that an action to recover it was therefore barred by the statute (1).

Conversion. In an action of trover the time runs from the conversion, and that although the plaintiff is ignorant of it (2). But the mere taking away or destroying a part of property, the rest of which remains in the hands of a bailee, is not such a conversion that the owner can sue in trover for the whole; much less may the bailee, if sued at a subsequent time, set it up as a conversion of the whole, for the purpose of supporting a plea of the statute (3).

Fraudulent concealment. If the conversion had been concealed by the fraud of the defendant, time would not run till the discovery of the fraud. Where a defendant is found to have fraudulently encroached on the mines of the plaintiffs, and carried away the minerals, the statute does not run in favour of the wrong-doer until the fraud has been discovered, or might, with reasonable diligence, have been discovered (4); but unless fraud is proved, the statute will run from the time of the wrongful act being committed (5). Where securities have been fraudulently misappropriated, the statute does not run till the discovery of the fraud (6). Where an executor left goods in the heir's house, with the

(1) *Reeves v. Hearne*, 1 M. & W. 323.

(2) *Granger v. George*, 5 B. & C. 149; 7 D. & R. 729. See *Edwards v. Clay*, 28 Beav. 145.

(3) *Philpott v. Kelley*, 3 A. & E. 106.

(4) *Ecclesiastical Commissioners for England v. North-Eastern Railway Co.*, 4 Ch. D. 845.

(5) *Trotter v. Maclean*, 13 Ch. D. 574.

(6) *In re Crosley. Munns v. Burn*, 35 Ch. D. 266; *Moore v. Knight* (1891), 1 Ch. 547.

heir's consent, and afterwards demanded them, and the heir refused to give them up, it was held that the time ran from the demand, because till then there was no conversion (1). If goods have been converted and afterwards sold, and the plaintiff waives the tort and brings his action for money had and received, the time still runs from the conversion, and not from the receipt of the money (2).

Where a tenant for life impeachable for waste fells timber, the statute begins to run against the remainderman from the time of the felling; or at all events, if the person entitled should waive the tort and sue for money had and received, from the time when the timber became money in the hands of the wrong-doer (3). But when the tenant for life is also owner of the first estate of inheritance, the statute would not begin to run till the death of the tenant for life (4).

In detinue the time begins to run from the moment when the possession of the defendant becomes unlawful. For instance, in an action to recover possession of title-deeds from a person who had been wrongfully in possession of the land, time was held not to have run so long as he was in the possession of the estate, as well as of the deeds, because the possession of the estate justified the possession of the deeds (5). Where the action of detinue is founded upon a wrongful conversion of the property only, as where there is a bare taking and withholding of the property of another, without any circumstances to show a trust for the owner, or to found an option to sue either for the wrong or for the breach of the terms of a bailment

(1) *Montague v. Lord Sandwich*, 7 Mod. 99. See per Lord Kenyon in *Compton v. Chandless*, 4 Esp. 20.

(2) *Denys v. Shuckburgh*, 4 Y. & C. 42. See *Godin v. Ferris*, 2 H. Bl. 14; *Crook v. McTavish*, 1 Bing. 167; *Fraser v. Swansea, &c., Co.*, 1 A. & E. 354.

(3) *Higginbotham v. Hawkins*, L. R. 7 Ch. 676; 41 L. J. Ch. 828; *Seagram v. Knight*, L. R. 2 Ch. 628. See *post*, Part V. Ch. XVIII.

(4) *Birch-Wolfe v. Birch*, L. R. 9 Eq. 683.

(5) *Plant v. Cotterill*, 5 H. & N. 430; 29 L. J. Exch. 198.

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under which the property has been deposited with the defendant, the statute runs from the time when the property is first wrongfully dealt with. But when goods have been entrusted to a person for safe custody, and an action of detinue is brought for a failure to deliver them back on demand, it is no defence that the bailee had parted with them before the demand was made, or more than six years before action. The failure to deliver according to the terms of the bailment is a cause of action for which an action may be brought at any time within six years of the demand, although more than six years have elapsed since the goods were parted with by the bailee (1). Where plaintiff's title-deeds were wrongfully deposited with the defendant by way of pledge, and the defendant so held them in ignorance of the right of the plaintiff, it was held that there was no conversion by the defendant until he refused to deliver them up at the plaintiff's demand, and that the statute did not begin to run before such demand and refusal (2). In such a case, besides the cause of action against the person who wrongfully deals with the title-deeds, there is a cause of action against the person who receives them from him, and if such person is ignorant who is the rightful owner, the cause of action against him does not accrue till the rightful owner has demanded the deeds and the person holding them refuses to deliver them up (3).

Forged
transfers.

Where forged transfers of stock in a company had been made, and the persons entitled applied to the company to be registered as owners of the stock, and the company refused, it was held that a complete cause of action against the company did not accrue until the company had refused to register the persons entitled, and that the statute did not begin to run till then (4).

(1) *Wilkinson v. Verity*, L. R. 6 C. P. 206.

(2) *Spackman v. Foster*, 11 Q. B. D. 99; *Miller v. Dell* (1891), 1 Q. B. 468.

(3) *Miller v. Dell*, *ubi supra*.

(4) *Barton v. North Staffordshire Railway Co.*, 38 Ch. D. 458.

In an action for libel brought in 1848 the statute was pleaded to the first count, which complained of a libel printed and published in the *Weekly Dispatch*, to wit, on the 19th September, 1830, and it was held that the plea was negatived by proof of the sale of one copy just before the action commenced (1).

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Libel.

In an action for slander, where the words themselves are not actionable without special damage, time will not run until the cause of action be complete by the accrual of the damage (2).

Slander
with
special
damage.

False imprisonment is a continuing cause of action, or rather, a fresh cause of action arises from day to day as long as the imprisonment continues; hence, if the imprisonment began more than four years before action, but continued to a time within the four years, an action may be maintained; but the defendant may divide the time, and plead the statute to so much of the imprisonment as took place more than four years from the time of action brought (3). The case is different in actions for malicious arrest or malicious prosecution, where the cause of action is the setting the law in motion. A declaration stated that the defendant procured one R. E. to oppose the discharge, under the Insolvent Act, of the plaintiff, who was in custody for debt, and to make an affidavit which the defendant knew to be untrue, and that on the hearing of the plaintiff's petition before the commissioner of the Insolvent Court, the defendant opposed as attorney of R. E. and produced the said affidavit in evidence, in consequence of which the commissioner refused the plaintiff the benefit of the Act till he had been in prison sixteen months, and that the plaintiff was accordingly imprisoned on detainer

False
imprison-
ment.

Malicious
arrest or
prosecu-
tion.

(1) *Duke of Brunswick v. Harmer*, 14 Q. B. 185.

(2) *Saunders v. Edwards*, 1 Sid. 95; Sir T. Raym. 61; *Littleboy v. Wright*, 1 Lev. 69; S. C. *sub nom. Littlebury v. Wright*, 1 Sid. 95. See *ante*, p. 5, and *Darley Main Colliery Co. v. Mitchell*, 11 App. Cas. 127.

(3) *Coventry v. Apsley*, 2 Salk. 420. See *Massey v. Johnson*, 12 East, 67.

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lodged against him by defendant on behalf of R. E. and remained sixteen months in prison. More than six years had elapsed from the date of the opposition and detainer, but less than six years from the end of the imprisonment. It was held that the cause of action was the procuring the commissioner to make the order, and that there was no fresh cause of action arising from day to day, as in the exercise of his judicial duty he might, upon the same representation, have ordered a shorter imprisonment, and the detention was the act of the Court, not of the defendant (1).

Action of
deceit.

. In an action of deceit the statute will run from the date of the fraudulent act complained of, unless such fraud has been actively concealed by the defendant, when the statute will run from the date of the discovery of the fraud (2).

Actions on
the case
where consequential
damage is
the ground
of action.

In all actions on the case founded upon tort where the consequential damage is the ground of action and the act complained of is not in itself a wrongful act, the statute runs from the date of the damage, and not from the date of the act which causes the damage (3). Thus, where the defendant, the lessee of minerals under land, the surface of which belonged to the plaintiff, worked the minerals and left insufficient support for the plaintiff's land, and more than six years after the working damage occurred to the plaintiff's land, it was decided by the House of Lords that the statute ran from the occurrence of the damage, and not from the working of the mine or the leaving insufficient support (4). Where there has been a continuance of the wrongful act causing damage,

(1) *Violett v. Sympson*, 8 E. & B. 344; 27 L. J. Q. B. 138.

(2) *Gibbs v. Guild*, 8 Q. B. D. 296; 9 Q. B. D. 59; *Barber v. Houston*, 14 L. R. Ir. 273; 18 L. R. Ir. 475.

(3) *Bonomi v. Backhouse*, E. B. & E. 622; 9 H. L. Cas. 503; 34 L. J. Q. B. 181. See *Whitehouse v. Fellowes*, 10 C. B. N. S. 765; 30 L. J. C. P. 305; *Hodsden v. Harridge*, 2 Wms. Saund. 166, note *q*; *Lloyd v. Wigney*, 6 Bingh. 489; *Wordsworth v. Harley*, 1 B. & Ad. 391; *Roberts v. Read*, 16 East, 215; *Gillon v. Boddington, Ry. & Mood*, 161; *Howell v. Young*, 5 B. & C. 259.

(4) *Bonomi v. Backhouse*, *ubi supra*.

a fresh cause of action arises from time to time (1). Where a lessee of mines under the plaintiff's land worked out the coal without leaving support and so caused damage to plaintiff's surface more than six years before action, and within six years of action a fresh subsidence causing fresh damage occurred without any fresh working by the defendant, it was decided by the House of Lords that an action in respect of the fresh damages so accruing was not barred, as the fresh subsidence causing fresh injury gave a fresh cause of action (2). Where the subsidence causing damage in such a case is continuous, there is a continuing cause of action, as long as the subsidence lasts (3).

It is laid down (4) that a cause of action cannot exist "unless there be also a person in existence capable of suing." Hence, if a person to whom a cause of action would have accrued if he were living die intestate before the cause of action accrues, the statute does not begin to run till administration has been taken out. This was first held in *Stanford's case* (5), which, although decided on the Statute of Fines, 4 Hen. VII. c. 24, applies in principle to the statute of James; it was approved of in *Cary v. Stephenson* (6), and ultimately established in *Murray v. East India Company* (7). In that case certain bills drawn in favour of a testator were accepted and became payable after his decease; no executor was appointed, and administration with the will annexed was granted

There
must be a
person who
can sue.

(1) *Whitehouse v. Fellowes*, 10 C. B. N. S. 765; 30 L. J. C. P. 305; *Battishill v. Reed*, 18 C. B. 696; *Devery v. Grand Canal Co.*, 9 Ir. R. C. L. 194.

(2) *Darley Main Colliery Co. v. Mitchell*, 11 App. Cas. 127.

(3) *Crumbie v. Wallsend Local Board* (1891), 1 Q. B. 503; *Fairbrother v. Bury, &c., Authority*, 37 W. R. 544.

(4) *Murray v. East India Co.*, 5 B. & Ald. 214.

(5) Cited in *Saffyn v. Adams*, Cro. Jac. 61.

(6) 2 Salk. 421; S. C. *sub nom. Curry v. Stephenson*, 4 Mod. 372.

(7) 5 B. & Ald. 204. See *Pratt v. Swaine*, 8 B. & C. 285; *Hyde v. Price*, 1 Cooper, C. C. 193; *Burdick v. Garrick*, L. R. 5 Ch. 233, 241; *Atkinson v. Bradford Third Equitable Benefit Building Society*, 25 Q. B. D. 377.

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after the bills became payable; the first administrator died and administration *de bonis non*, with the will annexed, was granted to the plaintiff. More than six years had elapsed since the bills became payable, but not since the time of the grant of the first letters of administration. It was decided by the Court of Queen's Bench, on the principle laid down above, that time did not begin to run till the first grant. A common case to which the principle would apply is where an administrator brings an action on a life policy effected by the intestate.

It has been said that if a creditor dies intestate on the day that a debt becomes payable to him, and there is no evidence to show whether he died before or after the moment when the debt became payable, the statute does not begin to run against the creditor's administrator until letters of administration have been taken out (1).

Executor
may sue
before
proving.

The rule above laid down does not apply where an executor is appointed and after the accrual of the cause of action proves the will, for the right of an executor to sue vests in him by virtue of the will, and he may commence the action before proving, and therefore it cannot be said that there was not a person in existence capable of suing. On the other hand, if he ultimately renounces, it may be (although it is believed that the point has never been decided) that, as the renunciation relates back to the death of the testator, it will be in effect as if there never had been an executor, and the time will not begin to run against an administrator until administration with the will annexed is granted. If this is so, the result would be curious; for if an executor is appointed and does not act till after the six years have elapsed, then, if he proves, the claim will be barred; but if he renounces and administration is taken out, the administrator can recover.

(1) Per Lord Esher, M.R., *Atkinson v. Bradford Third Equitable Benefit Building Society*, 25 Q. B. D. at p. 381.

If the cause of action accrues before the death of a testator or intestate, then on the general principle that when the time has once begun to run no subsequent event other than the bringing of an action or an analogous proceeding can stop it (1), the fact of there being an interval between the death of the testator or intestate and the grant of administration, will have no effect if the time has begun to run in the lifetime of the deceased person, which will not be the case if he was under disability at the time of the action accruing, and remained so up to the time of his death (2). In *Richards v. Richards* (3) a feme covert administratrix lent part of her intestate's estate to her husband on the security of a joint and several promissory note given by him and two others as sureties; the husband died in her lifetime, and she then sued the surviving promisors more than six years after the making of the note. It was held that the time began to run from the death of the husband. This was decided partly on the ground of the disability of the wife, but, as the husband was one of the promisors, he could not have joined with his wife in an action on the note, and there was, therefore, in fact, no one in his lifetime competent to bring the action, and this brings the case within the principle laid down above. Now by sect. 18 of the Married Women's Property Act, 1882 (4), a feme covert administratrix or executrix may sue in that character as if she were a feme sole, and therefore it would seem that the principle of the last-mentioned case is no longer applicable.

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Death of
person
entitled to
cause of
action.

As a cause of action, or, more strictly speaking, a complete cause of action cannot exist unless there is a person in existence capable of suing, so, on the other hand, a complete cause of action being the right to

There
must be a
person who
can be
sued.

(1) See *ante*, p. 24. *Cusack v. Fury*, Wallis ed. by Lyne, 330.

(2) *Penny v. Brice*, 18 C. B. N. S. 393; *Fergusson v. Fyffe*, 8 C. & F. 121, 140.

(3) 2 B. & Ad. 447.

(4) 45 & 46 Vict. c. 75.

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prosecute an action with effect, "no one has a complete cause of action until there is somebody that he can sue" (1). If, therefore, a cause of action accrues to a plaintiff after the death of the person against whom the action would have been brought, had he lived, time does not begin to run against the plaintiff until there is a personal representative in existence who can be sued. This principle was clearly laid down in *Douglas v. Forrest* (2). In that case, when the cause of action accrued, the debtor was abroad, and remained so till his decease; and it was held that the plaintiff had six years within which to bring his action after the executor had proved the will, and of course, in the case of an intestacy or the executor renouncing, the plaintiff would have six years from the date of the letters of administration. If, however, an executor has acted before proving, as he thereby renders himself liable to be sued, the time would run from his acting, and not from his proving the will (3). In *Webster v. Webster* (4), in which this point was first decided, it seems to have been overlooked that the testator might have been sued in his own lifetime. It is, however, perfectly clear that the time having begun to run against a plaintiff during the life of a person against whom he has a right of action, the want of a personal representative to be sued will not prevent the time continuing to run (5).

Cause of
action
accruing
during
bank-
ruptcy.

In a case which arose under the Bankruptcy Act of 1869 (6) it was decided that where the cause of action accrued during the bankruptcy of the person liable to be

(1) See per Best, C.J., *Douglas v. Forrest*, 4 Bingh. 704.

(2) 4 Bingh. 686; 1 M. & P. 663, and see *Joliffe v. Pitt*, 2 Vern. 694; *Story v. Fry*, 1 Y. & C. Ch. C. 603.

(3) See *Douglas v. Forrest*, 4 Bingh. 704; *Flood v. Patterson*, 29 Beav. 295; 30 L. J. Ch. 486.

(4) 10 Ves. 93.

(5) *Rhodes v. Smethurst*, 4 M. & W. 42, and 6 M. & W. 351; *Freaker v. Cranefeldt*, 3 M. & C. 499; *Howlett v. Lambert*, 2 Ir. Eq. R. 254; *Boatwright v. Boatwright*, L. R. 17 Eq. 71.

(6) 32 & 33 Vict. c. 71.

sued, as no action could be brought while the bankruptcy was in force, the statute did not begin to run till after the annulment of the bankruptcy (1). And the same principle would probably be still applied under the Bankruptcy Act, 1883 (2), at all events as regards any debt proveable in the bankruptcy (3).

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If a person brings an action within six years of the accrual of the cause of action and dies, a fresh action brought by his personal representatives within a reasonable time of the proof of the will or of the grant of administration will not be barred by the statute, although at the time that the second action is brought, more than six years may have elapsed since the cause of action accrued to the person deceased. The Courts have so held on the equitable construction of sect. 4 of the statute of James, and have laid down that a year by analogy with that section is a reasonable time (4). So where an action abated by the death of the defendant, and the plaintiff commenced a fresh action after the expiration of the six years, but within four months of the grant of administration, it was held that the action was in time (5). Where a statute for allotting waste lands in a manor directed that all disputed claims should be brought within six months, and an action brought within the six months against a copyholder abated by his death, it was held that the action must be revived within six months after the plaintiff had notice of the descent (6). But where an action by a termor for injury to his premises by a riotous assembly was brought under the statute 7 & 8 Geo. IV. c. 31, which directed that no

Death of
plaintiff or
defendant
after
action
brought.

(1) *In re Crosley. Munns v. Burn*, 35 Ch. D. 266.

(2) 46 & 47 Vict. c. 52.

(3) See s. 9, subs. (1), and s. 37, subs. (3).

(4) *Kinsey v. Hayward*, 1 Ld. Raym. 432; 12 Mod. 568; *Wilcox v. Huggins*, 2 Str. 907; Fitzg. 170, 289; *Hodsdon v. Harridge*, 2 Wms. Saund. 173.

(5) *Curlewis v. Earl of Mornington*, 7 E. & B. 283; 26 L. J. Q. B. 181; 27 L. J. Q. B. 439.

(6) *Knight v. Bate*, Cowp. 738.

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person should bring such an action “unless he shall commence the same within three calendar months after the commission of the offence,” and the plaintiff died, and his personal representatives brought a fresh action within seven days of his death, but after the expiration of the three months, it was held that their action was too late, for there was nothing in the statute enabling the Court to put an equitable construction on it, and, as the action could only be brought by virtue of the statute, the time of commencing it was a condition precedent (1).

But now by R. S. C. 1883, Ord. xvii. (2), if the cause of action survives, there is no abatement of an action by the death either of plaintiff or defendant, and the proceedings may be carried on by or against the personal representatives of the plaintiff or defendant. But the remedy thus provided has not affected the previously existing remedy, and in the case of the death of a defendant after the issue of a writ, the plaintiff may commence a fresh action against the personal representatives of the defendant within a year of the proof of the will or of the grant of administration, although the statutory period has elapsed (3). The same principle would apply to the death of a plaintiff, in which case his personal representatives might, instead of adopting the remedies of Ord. xvii., bring a fresh action, and if the action of the deceased person was in time, the fresh action would not be statute-barred if brought within a year of the proof of the will or of the grant of administration. But the remedies of Ord. xvii. must be resorted to in cases analogous to that of *Adam v. The Inhabitants of Bristol* (4), where the statutory period has elapsed and a fresh action cannot be brought. In equity before the Judicature Act, 1873, a bill of revivor might have

(1) *Adam v. The Inhabitants of Bristol*, 2 A. & E. 389.

(2) R. S. C. Ir. 1891, O. xvii.

(3) *Swindell v. Bulkeley*, 18 Q. B. D. 250.

(4) 2 A. & E. 389.

been filed within six years of the date of the letters of administration, whatever time had elapsed since the accrual of the cause of action (1). Bills of revivor are now abolished, and the procedure relating to revivor is now regulated by R. S. C. 1883, Ord. xvii. As the statute might have been pleaded to a bill of revivor (2), it would appear that an order giving leave to carry on an action by or against the personal representatives of a deceased person would not now be made after the expiration of six years from the proof of the will or the grant of administration (3).

The operation of the statute, when it has once begun to run, may be suspended when the administration of the goods of a creditor is granted to the debtor, for this, being the act of law, does not extinguish the debt, but suspends the remedy (4). Thus, where a tenant for life committed legal waste, and afterwards on the death of the remainderman became his administrator, it was held by Chelmsford, L.C., that the operation of the statute which had begun to run from the time of the commission of the waste was suspended by the grant of administration till after the death of the tenant for life (5).

Adminis-
tration of
goods of
creditor
granted to
debtor.

(1) *Perry v. Jenkins*, 1 M. & C. 118.

(2) *Hollingshead's Case*, 1 P. Wms. 742.

(3) But see *Micklethwaite v. Vavasour*, 37 Sol. J. 386.

(4) *Nedham's Case*, 8 Rep. 135a; *Wankford v. Wankford*, 1 Salk. 299.

(5) *Seagram v. Knight*, L. R. 2 Ch. 628; 36 L. J. Ch. 918.

CHAPTER III.

DISABILITIES.

PART I.
CH. III.
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THE 7th section of the statute of James provides for cases where the persons entitled to commence an action are under disabilities at the time when the cause of action accrues. The section is as follows:—

21 Jac. I.
c. 16, s. 7.
Disability
of plaintiff.

“If any person or persons that is or shall be entitled to any such action of trespass, detinue, action sur trover, replevin, actions of accounts, actions of debts, action of trespass for assault, menace, battery, wounding or imprisonment, actions upon the case for words be or shall be at the time of any such cause of action given or accrued, fallen or come, within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned or beyond the seas, then such person shall be at liberty to bring the same actions so as they take the same within such times as are before limited after their coming to or being of full age, discover, of sane memory, at large, and returned from beyond seas, as other persons having no such impediment should have done.”

Assumpsit.

The action of *assumpsit* is omitted in this clause, but it has been held that both *indebitatus assumpsit* and *assumpsit* for unliquidated damages are within the equity of it (1).

Suits in
the
Admiralty
Court.

The provisions of sect. 7 of the statute of James were expressly extended to actions and suits for seamen's

(1) *Roche v. Hepman*, 1 Barnardiston, 172; *Chandler v. Vilett*, 2 Wms. Saund. 395; *Crosier v. Tomlinson*, 2 Mod. 71; *Piggott v. Rush*, 4 A. & E. 912.

wages in the Admiralty Court by 4 & 5 Anne, c. 3 (1), s. 18.

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By sect. 10 of the Mercantile Law Amendment Act, 1856 (2), the provisions of these statutes so far as they related to disabilities of plaintiffs from being beyond seas or in prison were repealed. The section is as follows:—

Mercantile
Law
Amend-
ment Act,
1856, s. 10.

“No person or persons who shall be entitled to any action or suit with respect to which the period of limitation within which the same shall be brought, is fixed by the Act 21 Jac. I. c. 16, s. 3, or by the Act 4 Anne, c. 16 (3), s. 17; or by the Act 53 Geo. III. c. 127, s. 5; or by the Acts 3 & 4 Wm. IV. c. 27, ss. 40, 41, and 42, and c. 42, s. 3; or by the Act 16 & 17 Vict. c. 113, s. 20, shall be entitled to any time within which to commence and sue such action or suit beyond the period so fixed for the same by the enactments aforesaid, by reason only of such person or some one or more of such persons being at the time of such cause of action or suit accrued beyond the seas, or in the cases in which by virtue of any of the aforesaid enactments, imprisonment is now a disability, by reason of such person or some one or more of such persons being imprisoned at the time of such cause of action or suit accrued.”

Imprison-
ment and
absence
beyond
seas.

The case of a defendant's absence beyond the seas was held not to be within the equity of the statute of James (4), but was provided for by section 19 of the statute of Anne above referred to. The section is as follows:—

Absence of
defendant
beyond
seas.

“If any person or persons against whom there is or shall be any such cause of suit or action for seamen's wages, or against whom there shall be any cause of action of trespass, detinue, action sur trover or replevin

4 & 5
Anne, c. 3,
s. 19.

(1) Also called 4 Anne, c. 16.

(2) 19 & 20 Vict. c. 97.

(3) Also called 4 & 5 Anne, c. 3.

(4) *Hall v. Wybourn*, 2 Salk. 420.

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for taking away goods or cattle, or of action of account, or upon the case, of debt grounded upon any lending or contract without specialty, or of debt for arrearages of rent, or assault, menace, battery, wounding and imprisonment, or any of them, be or shall be at the time of any such cause of suit or action given or accrued, fallen or come, beyond the seas, then such person or persons who is or shall be entitled to any such suit or action shall be at liberty to bring the said actions against such person and persons, after their return from beyond the seas, so as they take the same after their return from beyond the seas, within such times as are respectively limited for the bringing of the said actions before by this Act, and by the said other Act made in the one and twentieth year of the reign of King James I."

Action
may be
brought
during
disability.

The 7th section of the statute of James is a saving clause, and of itself imposes no disability, and the plaintiff is at liberty to bring his action during the disability, in any way he might have done if the Act had not passed, and that whether the six years have elapsed or not, and has in addition six years after the disability ended, and the same construction must be put on the proviso in the statute of Anne (1).

Promissory
note to
feme
covert.

Before the Married Women's Property Act, 1882 (2), if a promissory note was made to a married woman, time ran against the husband from the time when the note became due, and therefore if the wife died in his lifetime after the six years had elapsed, the remedy was gone; if, however, she survived him, she had six years from his death to bring her action (3). The effect of the Married Women's Property Act, 1882, is that coverture is no longer a disability, and the statute runs against married women as against other plaintiffs, from the time when

(1) *Forbes v. Smith*, 11 Exch. 161.

(2) 45 & 46 Vict. c. 75.

(3) *Richards v. Richards*, 2 B. & Ad. 447; *Scarpellini v. Atcheson*, 7 Q. B. 864.

the cause of action accrues (1). In the case of women married before the 1st January 1883, when the Act came into operation, it was held that the statute did not run until that date in respect of causes of action which had accrued previously (1).

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Beyond seas, at common law, means beyond the seas actually surrounding Great Britain; therefore, in the statute of James, and also in the statute of Anne, Ireland was beyond the seas (2), but not Scotland (3). By the 3 & 4 Wm. IV. c. 42, s. 7, "no part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part of the dominions of his Majesty, shall be deemed to be beyond the seas within the meaning of this Act, or of the Act passed in the 21st year of King James the First intituled 'An Act for Limitation of Actions and for avoiding of Suits in Law.'" This section did not extend to the statute of Anne, but was extended to that statute by the Mercantile Law Amendment Act, 1856 (4). This provision was decided not to apply when the cause of action arose before the passing of the Mercantile Law Amendment Act (5).

What
countries
are beyond
the seas.

In the case of *Ruckmaboye v. Lulloobhoy Mottichund* (6), it was held that in applying the statute to India, when the statute was applicable to India, "beyond the seas" meant "out of the territories," that is to say, out of the British dominions in India. Scotland, although out of the jurisdiction of the English courts, was never held to be beyond seas within the meaning of the statutes (7).

(1) See Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1, subs. 2. *Lowe v. Fox*, 15 Q. B. D. 667; *Weldon v. Neal*, 51 L. T. 289; 32 W. R. 828.

(2) *Anon.* 1 Show. 91, per Holt, C.J.; *Lane v. Bennett*, 1 M. & W. 70.

(3) *King v. Walker*, 1 W. Bl. 286.

(4) 19 & 20 Vict. c. 97, s. 12.

(5) *Flood v. Patterson*, 29 Beav. 295; 30 L. J. Ch. 486.

(6) 8 Moore P. C. 4.

(7) *King v. Walker*, 1 W. Bl. 286.

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If a defendant, who is beyond seas when the cause of action arises, returns to England for ever so short a time, even without the plaintiff's knowledge, the time begins to run (1). A foreigner, who has never been in England, is as much within the exception as an Englishman (2). The exception also applies where the cause of action arises abroad, although the remedy may be barred in the country where the cause of action arose, provided the liability be not extinguished by the laws of that country (3). In *Williams v. Jones* (4) the cause of action arose within the jurisdiction of the Supreme Court of Calcutta, where the plaintiff and the defendant were then both resident. The plaintiff soon afterwards returned to England; the defendant remained in India for more than six years, and then returned to England. The plaintiff commenced his action within six years of the defendant's return; it was held that he was not barred of his remedy here, although his remedy would have been barred in Calcutta by the statute of James, which was then in force there. The result of these cases is, that if a cause of action arises in a foreign country between two persons, even though one or both of them be foreigners, the plaintiff may sue the defendant in our courts within six years of the defendant's first coming to England after the cause of action arose. If by the *lex loci contractus* the right under a contract is itself extinguished, instead of the remedy merely being barred, and both parties have resided in the country where the contract was entered into during the whole of the prescribed time, then, since the right is determined by the *lex loci contractus* and the remedy only by the *lex fori*,

(1) *Gregory v. Hurrill*, 5 B. & C. 341.

(2) *Strithorst v. Graeme*, 2 W. Bl. 723; 3 Wils. 145; *Lafond v. Ruddock*, 13 C. B. 813; *Pardo v. Bingham*, L. R. 4 Ch. at p. 738.

(3) *Williams v. Jones*, 13 East, 450; *Huber v. Steiner*, 2 Bingh. N. C. 202; 2 Scott, 304; *Harris v. Quine*, L. R. 4 Q. B. 653; 38 L. J. Q. B. 331; 10 B. & S. 644; *Alliance Bank of Simla v. Carey*, 5 C. P. D. 429.

(4) 13 East, 439.

there is no right of action, although under the circumstances of the case the English Statutes of Limitation would not prevent an action being maintained as where the defendant has first come into England within the last six years (1). And the non-residence of either of the parties in the country where the contract is made during any part of the prescribed time would, it seems, make no difference, provided that the debt was equally extinguished (2).

Before the Mercantile Law Amendment Act (3) abolished the disability of the absence of plaintiffs beyond seas, it was held in *Perry v. Jackson* (4) that if one or more of several co-plaintiffs were within the seas when the cause of action arose, the time ran equally against all.

Disability
of one co-
plaintiff.

The 10th section of the Mercantile Law Amendment Act, 1856, above referred to, was held to apply where the cause of action arose before as well as where it arose after the passing of the Act (5). The decision in *Perry v. Jackson* is therefore now quite unimportant, unless it applies to cases of disability arising from causes other than absence beyond seas or imprisonment. The reason of the decision in *Perry v. Jackson* was that the case was not within the words of the proviso in the 7th section of the statute of James, and, as the plaintiffs in England might have sued and used the name of their co-plaintiff who was abroad, it would have been against the policy of the statute to extend the grammatical meaning of the words to a case which did not require it.

(1) *Huber v. Steiner*, 2 Bingh. N. C. 202 and 211; 2 Scott, 304; Story's Conflict of Laws, Ch. XIV., § 582; *Shelby v. Guy*, 11 Wheaton's Rep. 361, 371, 372; *Harris v. Quine*, L. R. 4 Q. B. 653; 38 L. J. Q. B. 331; 10 B. & S. 644; *Alliance Bank of Simla v. Carey*, 5 C. P. D. 429; *Finch v. Finch*, 45 L. J. Ch. 816.

(2) See 1 Smith's L. C. notes to *Mostyn v. Fabrigas*, 5th ed. 642; 9th ed. 678.

(3) 19 & 20 Vict. c. 97, s. 10.

(4) 4 T. R. 516.

(5) *Cornill v. Hudson*, 8 E. & B. 429; 27 L. J. Q. B. 8; *Pardo v. Bingham*, L. R. 4 Ch. 735.

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CH. III.Disability
of one co-
defendant.

Before the Mercantile Law Amendment Act, 1856, it was held that if any one or more of several joint debtors were beyond the seas when the cause of action arose, the time did not begin to run either in favour of those abroad (1) or those at home (2), until the return of the former. The ground of those decisions was not that there was any difference in the grammatical construction of the proviso in the statute of Anne from that in the statute of James, but that, by holding otherwise, an injustice would be done to the plaintiff which it was manifestly the intention of the statute of Anne to prevent. The 11th section of the Mercantile Law Amendment Act, 1856, enacts as follows :—

19 & 20
Vict. c. 97,
s. 11.

“Where such cause of action or suit with respect to which the period of limitation is fixed by the enactments aforesaid, or any of them, lies against two or more joint debtors, the person or persons who shall be entitled to the same shall not be entitled to any time within which to commence and sue any such action or suit against any one or more of such joint debtors who shall not be beyond the seas at the time such cause of action or suit accrued, by reason only that some other one or more of such joint debtors was or were at the time such cause of action accrued beyond the seas, and such person or persons so entitled as aforesaid shall not be barred from commencing and suing any action or suit against the joint debtor or joint debtors who was or were beyond the seas at the time the cause of action or suit accrued after his or their return from beyond seas, by reason only that judgment was already recovered against any one or more of such joint debtors who was not, or were not beyond seas at the time aforesaid.”

It should be observed that in this section “joint debtors” is the only word used, and not “co-contractors or co-debtors,” as in the 14th section; it therefore would

(1) *Fannin v. Anderson*, 7 Q. B. 811.(2) *Towns v. Meud*, 16 C. B. 123; 24 L. J. C. P. 89.

seem, although it is believed there is no decision on the point, not to refer to any cause of action but that of actual debt, and that all cases of damages arising from breach of contract are excluded. The decisions, therefore, in the cases referred to before the passing of the Act, are still of importance.

In *Towns v. Mead* (1), Jervis, C.J., intimated that if an absent co-contractor died abroad, the survivor in England might be sued within six years of the death, such being the true equitable construction of the statute. The other judges avoided giving a decision on this point, which it was not actually necessary to decide. But the opinion of Jervis, C.J., would probably be held correct, as this case and the case of the representatives of a plaintiff dying under disability, or a defendant dying abroad, discussed below (2), seems all to depend on the same principle of construction.

Joint
defendant
dying
abroad.

If the party entitled to the cause of action be under one disability when the cause of action arises, and before that disability ceases, is affected by another, and then the first disability ends, the second remaining, time will not begin to run till the second disability has ceased. This has so been decided in a case in Ireland (3), under a corresponding section in an Irish Act (10 Car. I. sess. 2, c. 6, s. 13), and in England (4) under the corresponding section (sect. 16) of 3 & 4 Wm. IV. c. 27; and although the wording of these sections is different from the wording of the 7th section of the statute of James, the same principle of construction is applicable to them. And the same principle would apply to the construction of sect. 22 of the Irish statute, 16 & 17 Vict. c. 113. Of course if there be any interval between the determination of the original disability and the supervening of the

Successive
disabilities.

(1) 16 C. B. 123; 24 L. J. C. P. 89.

(2) P. 62.

(3) *Lessee of Supple v. Raymond*, Hayes, 6.

(4) *Borrows v. Ellison*, L. R. 6 Exch. 128.

PART I.
CH. III.

Right of
executors
of person
dying
under
disability.

second disability, time having once begun to run, the second disability has no effect whatever (1).

If a person is under disability when the cause of action accrues to him and so continues up to his death, his personal representatives have a right of action, although the six years have elapsed during his life. This was decided in *Strithorst v. Graeme* (2) and *Townsend v. Deacon* (3). In both these cases the person to whom the action accrued was beyond the seas, but they apply in principle to every case of disability. It is, however, an undecided point whether the personal representative is under any limitation whatever in such a case, the argument against any limitation being that the event from which the six years under the statute begin to run—namely, the ceasing of the disabled person to be under disability—has not and never can happen, and that the right of the personal representative is the same right which the person under disability had while under it. In the case last quoted, Parke, B., was of opinion that the representative was not limited; Rolfe, B., that he was. The latter says: “The more reasonable equity would be to consider the right of action as accruing to the executor at the time of the death of the testator, and that the action ought to be brought within six years of that time.” And if, as Parke, B., observes in the same case, the personal representatives may bring the action “as standing in the same position and possessing the same rights” as the person who died under disability, which appears to be the true ground on which that decision is to be supported, it is submitted that his death cannot put his representatives in a better position or give them more rights than he would have had if the disability had ceased in his lifetime. The true view seems to be that, as it is by an equitable construction only that

(1) *Borrows v. Ellison*, L. R. 6 Exch. 128.

(2) 2 W. Bl. 723; 3 Wils. 145.

(3) 3 Exch. 706.

the right to bring an action when six years have elapsed after the accrual of a cause of action is reserved to the personal representatives who are not named in the statute, so by the same equitable construction the limitation ought to be extended to them, and that their right to bring an action should be limited to six years after the death under disability of the person whose representatives they are.

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In the case of the executor of a person under disability it is clear that the time, if it runs at all, must run from the death of the testator. But what if the person under disability dies intestate? Does the time then run from his death or the taking out of administration? If Rolfe, B., is right in the observation above quoted, the time would, on the principle stated in a former chapter (1), run from the date of the letters of administration. But even without taking his view this position may be supported on the ground that there is no person capable of suing between the death of the intestate and the grant of administration, and the time has not begun to run before. But, on the other hand, it may be argued that the grounds on which it was decided in cases where the cause of action arose after the death of the intestate, that the time did not run till administration granted, do not apply here, because, when the intestate is under disability, there is none the less a perfect cause of action, since the intestate, though protected by his disability, was yet capable of suing.

Right of
adminis-
trator.

Assuming that executors are limited in time, will a disability affecting them at the time of their testator's death still prevent the statute from beginning to run? This question can only arise where all the executors are, or a sole executor is, under disability, and no administration is taken out in the meanwhile, but probate is granted when the disability is removed. As it is still undecided whether executors are limited at all, there are

Disability
of
executors
of testator
dying
under
disability.

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of course no decisions on the point. As in the case of successive disabilities the time does not run till the last disability has ceased (1), it would seem that the same principle should be applied when the executors of a person dying under a disability are themselves under a disability, and that the time will not run till the sole executor, or one of the executors, ceases to be under disability. So it was held in *Cotton's case* (2), under the Statute of Fines (3), that a disability in the heir claiming under an ancestor who died under disability protected the heir. The case of *Doe v. Jesson* (4), which was decided on the 2nd section of the statute of James, is no authority on the point, for the decision against the heir in that case was grounded on the effect of the word "death" there introduced, which is absent alike from the Statute of Fines and the 7th section of the statute of James.

Where
party
liable to be
sued dies
abroad.

In the case of a person liable to an action remaining abroad from the time when the cause of action accrues until his death, an action no doubt lies against his representatives, although the six years may have elapsed in his lifetime, and time will not begin to run till letters of administration are taken out or the executor has proved or acted; and if the executor be himself abroad at the time of the death of the testator, time will not begin to run till the executor has both returned home and either acted in England or proved the will (5).

(1) *Borrows v. Ellison*, L. R. 6 Exch. 128.

(2) 1 Leon. 211. See *Dillon v. Leman*, 2 H. Bl. 584.

(3) 4 H. VII. c. 24.

(4) 6 East, 80.

(5) *Flood v. Patterson*, 29 Beav. 295; 30 L. J. Ch. 486.

CHAPTER IV.

ACKNOWLEDGMENTS.

NOTWITHSTANDING the express words of the statute, it was soon held that the acknowledgment of a debt within six years of action brought took the case out of the operation of the statute. As parol evidence of such acknowledgments was admitted, the beneficial operation of the statute was much limited, and in consequence it was provided by 9 Geo. IV. c. 14, s. 1, commonly called Lord Tenterden's Act, after referring to the statute of James and the corresponding Irish Act, as follows :—

“In actions of debt or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the operation of the said enactments or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby ; and where there shall be two or more joint contractors or executors or administrators of any contractor, no such joint contractor, executor or administrator shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them : Provided always that nothing herein contained shall alter or take away or lessen the effect of any payment of

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Acknowledgment
of debt.

9 G. IV.
c. 14, s. 1.

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any principal or interest made by any person whatsoever :
 Provided also that in actions to be commenced against two or more such joint contractors or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited Acts or this Act, as to one or more of such joint contractors, or executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment or promise or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants, against whom he shall recover, and for the other defendant or defendants against the plaintiff."

What acknowledgment is sufficient

It was held that this Act applied to all actions brought after the Act came into operation, whether the acknowledgment was made before or after that time (1). The Act gave no statutable effect to an acknowledgment and made no provision as to its nature, but merely altered the mode of proof, and left the nature and effect of an acknowledgment untouched (2). The decisions as to what the nature of an acknowledgment must be in order to take a debt out of the statute have been very conflicting. In the earlier cases an express (3) promise to pay or a conditional promise, with proof of the fulfilment of the condition, was necessary (4). Later decisions held that an admission of the existence of the debt was all that was required ; so that even if the admission were accompanied by a refusal to pay, or a claim of the benefit of the statute, the case was still held to be taken out of the

(1) *Towler v. Chatterton*, 3 M. & P. 619; *Kirkhaugh v. Herbert*, cited, *ib.* p. 628.

(2) *Haydon v. Williams*, 7 Bingham 163; *Moodie v. Bannister*, 4 Drew. 432, 440; 28 L. J. Ch. 881.

(3) *Bass v. Smith*, Duncomb, Trials *per Pais*, 495, 12 Vin. Abr. 229; *Dickson v. Thomson*, 2 Show. 126; *Andrews v. Brown*, Prec. Ch. 385; *Bland v. Haselrig*, 2 Vent. 151; *Sparling v. Smith*, 1 Ld. Raym. 741; *Owen v. Wolley*, Bull. N. P. 148.

(4) *Heyling v. Hastings*, 1 Ld. Raym. 389, 421; 1 Com. 54; 1 Salk. 29; 5 Mod. 426; 12 Mod. 223.

statute (1). The ground on which the doctrine was carried so far was that the statute was founded on presumption of payment; whatever repelled that presumption was an answer to the statute, and any acknowledgment which repelled that presumption was in legal effect a promise to pay the debt (2). Towards the end of the period in which the cases grounded on this view were decided, there were also others in which the judges showed an inclination to return to the principle of the older decisions (3).

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This conflict of opinion was ultimately set at rest in 1827 by the decision of the King's Bench in *Tanner v. Smart* (4), which has remained a leading case ever since. In that case the action was brought on a promissory note, which became due more than six years before action brought, but within the six years the defendant was proved to have said: "I cannot pay the debt at present, but I will pay it as soon as I can," and there was no evidence of his ability to pay. It was held, after fully going into all the cases, that proof of ability was required to turn the

Tanner v.
Smart.

(1) *Anon.*, 12 Vin. Abr. 192; *Yea v. Fouraker*, Bull. N. P. 149; *Quantock v. England*, 5 Burr. 2628; *Richardson v. Fen*, Lofft, 86; *Trueman v. Fenton*, Cowp. 548; *Lawrence v. Worrall*, Peake, 127; *Baillie v. Lord Inchiquin*, 1 Esp. 435; *Clarke v. Bradshaw*, 3 Esp. 155; *Bryan v. Horseman*, 4 East, 599; *Rucker v. Hannay*, 4 East, 604, n.; *Partington v. Butcher*, 6 Esp. 66; *Leaper v. Tatton*, 16 East, 420; *De la Torre v. Barclay*, 1 Stark. 7; *Loweth v. Fothergill*, 4 Campb. 185; *Dowthwaite v. Tibbut*, 5 M. & S. 75; *Thompson v. Osborne*, 2 Stark. 98; *Frost v. Bengough*, 1 Bingh. 266; *Clark v. Hougham*, 2 B. & C. 149; *Colledge v. Horn*, 3 Bingh. 119; *Lloyd v. Maund*, 2 T. R. 760.

(2) *Per* Lord Tenterden, 6 B. & C. 604.

(3) *Davies v. Smith*, 4 Esp. 36; *Birk v. Guy*, 4 Esp. 184; *Coltman v. Marsh*, 3 Taunt. 380; *Rowcroft v. Lomas*, 4 M. & S. 457; *Craig v. Cox*, Holt. 380; *Hellings v. Shaw*, 7 Taunt. 608; *Powell v. Graham*, 7 Taunt. 580; *Bicknell v. Keppel*, 1 B. & P., N. R. 20; *Baillie v. Sibbald*, 15 Ves. 185; *Beale v. Nind*, 4 B. & Ald. 568; *Snook v. Mears*, 5 Price, 636; *Miller v. Caldwell*, 3 D. & R. 267; *Knott v. Farren*, 4 D. & R. 179; *A'Court v. Cross*, 3 Bingh. 329; *McCulloch v. Dawes*, 9 D. & R. 40; *Scales v. Jacob*, 3 Bingh. 638; *Tulloch v. Dunn*, R. & M. 416; *Ayton v. Bolt*, 4 Bingh. 105; *Swan v. Sowell*, 2 B. & Ald. 759.

(4) 6 B. & C. 603.

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conditional promise into an absolute one, and there was therefore no sufficient acknowledgment to take the case out of the statute, for upon a general acknowledgment where nothing is said to prevent it, a general promise to pay may and ought to be implied; but where a party guards his acknowledgment and accompanies it with an express declaration to prevent any such implication, the rule *expressum facit cessare tacitum* must apply. Ever since the decision in *Tanner v. Smart* it has been settled law that nothing can take a debt out of the statute, unless it amounts to an express promise to pay or an unconditional acknowledgment of the debt from which such an express promise may be implied. There have been numerous cases on the point, but the question has always been whether the words accompanying the acknowledgment were such as in any manner to qualify the promise which would *primâ facie* be implied in it, and the tendency of the decisions since *Tanner v. Smart* has been to confine rather than to extend the operation of acknowledgments. In one case (1) an opinion was expressed that even when the condition was fulfilled, a conditional promise could not be used to support a count on the original cause of action, but must be declared on specially. This, however, seems inconsistent with the judgment in *Tanner v. Smart* and other cases, and hardly to be supported on principle (2).

As a promise to pay on the fulfilment of a condition or the happening of an event does not become absolute till the condition is fulfilled or the event happens, the six years for which such a promise will renew the right of action do not commence till that time, and an action brought within such six years is in time, though more than that period has elapsed since the making of such promise (3).

(1) *Haydon v. Williams*, 7 Bingh. 163.

(2) See chapter on Pleading, Part VIII. Ch. I.

(3) *Maunsell v. Hedges*, 2 Ir. C. L. R. 88; *Hammond v. Smith*, 33 Beav. 452; 10 Jur. N. S. 117.

Though the rule laid down in *Tanner v. Smart* is perfectly clear, it is often difficult, owing to the variety of expressions employed by different persons, to apply the rule to each particular case. In consequence of this difficulty there are a good many cases on the subject, the chief of which, since *Tanner v. Smart*, will be found below, arranged in order of their date in two classes, according as the acknowledgment was held sufficient or insufficient. So far as is practicable, the expressions upon which the decisions chiefly turned are given, but in many cases the letters or other documents containing the acknowledgment are too long to set out at length, and other circumstances explaining or bearing on the written acknowledgment have often an effect on the decisions.

Sufficient Acknowledgments.

“I have for a length of time been in expectation of receiving the account of whatever I may stand indebted to you ; let me again request that you will oblige me with it, that everything may be settled.” (1828.) *Rendell v. Carpenter*, 2 Y. & J. 484.

Defendant expressed regret that “the balance” was not paid, saying that his brother would shortly call and pay it. No evidence what the balance was. Verdict for the plaintiff for 1s. damages. (1831.) *Dickinson v. Hatfield*, 5 C. & P. 46 ; 1 M. & R. 141 ; 2 M. & M. 141.

“I hereby acknowledge that Messrs. Bewley have either a bill or a note of mine which might possibly be upwards of six years from its date. I of course will not plead the Statute of Limitations.” Parol evidence admissible to shew what was the precise note or bill referred to. (1833.) *Bewley v. Power*, Hayes & Jones (Ir.), 368.

One of two joint debtors wrote to plaintiff, “I will at any time pay my proportion of the debt due on applica-

Sufficient Acknowledgments—continued.

tion for the same.” *Held*, that evidence of proportion having been given, plaintiff might recover the whole of such proportion. (1833.) *Lechmere v. Fletcher*, 1 C. & M. 623.

“I cannot comply yet. The best way would be to send me the bill that you hold, and draw another for the balance of the money, which will be £30 9s. 9d.” *Held*, sufficient acknowledgment that £30 9s. 9d. was due. (1834.) *Dabbs v. Humphries*, 10 Bing. 446.

“I never can be happy till I have not only paid you everything, but all to whom I owe money. Your account is correct. Oh, that I were going to enclose the amount of it!” (1835.) *Dodson v. Mackey*, 8 A. & E. 225, n.

“I am very wretched on account of your account not being paid. There is a prospect of an abundant harvest, which must turn into a goodly sum, and considerably reduce your account. If it does not, the concern must be broken up to meet it. My hope is that out of the present harvest you will be paid.” (1837.) *Bird v. Gammon*, 3 Bingh. N. C. 883; 5 Scott, 213.

“The £100 she (plaintiff) has been receiving double and treble for.” Left to the jury by Parke, B., who expressed an opinion that this was an admission of a loan, the words being written in answer to a letter from the plaintiff’s solicitor containing these words: “She (plaintiff) says you have not even paid the interest on the £100.” (1840.) *Bucket v. Church*, 9 C. & P. 209.

Cross-claims between plaintiff and defendant. Defendant pleads set-off. Plaintiff at foot of his bill against the defendant had put, “By Mr. Lacy’s (i.e. defendant’s) bill,” and asked to be paid the balance. *Held*, sufficient

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acknowledgment of the defendant's set-off. (1840.)
Waller v. Lacy, 1 Scott N. R. 186.

Recital in a deed executed by A. & B., that A. was indebted to B. in various sums, the amount of which was not ascertained, and a balance not yet struck, and that A. was willing to pay B. the amount which might appear to be due in respect of such sum, to be ascertained and paid as thereafter mentioned—provision that account should be taken by the arbitration of two persons named in the deed. £5000 reserved by the deed for the payment of the sum that should be found to be due. *Held* (coupled with extrinsic parol evidence as to amount), sufficient to take the debt out of the statute. (1840.)
Cheslyn v. Dalby, 4 Y. & C. Exch. 238.

Bill of exchange given by a bankrupt to a creditor in consideration of advance of money made more than six years before the bill. Sufficient acknowledgment. (1841.) *Ex parte Wilson*, 1 Mont. D. & De G. 586.

“I do not desire that you, or any one of my creditors, should lose what I owe them; on the contrary, it is very much my wish not only to pay my debts, but interest upon them, if I can. As you have mentioned the Limitation Act . . . I answer at once by saying that I am ready to put it out of my power to take advantage of that Act, and will immediately give you my note for whatever amount is due to you. To pay you now, or within the year, I am utterly unable. I really have not, as you imagine, received £600 . . . nor anything like that sum. . . It is, of course, indispensable that the exact sum I owe you should be fixed, whether you accept my note or not. I have clearly shewn you in a former letter that your account is not in accordance with the estimate upon which you agreed to do the work. . . If you really cannot

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produce the original estimate, or the rough draft of it, certainly it is reasonable that more (and considerable) deduction should be made from your charges. . . You will perhaps say what deduction you are prepared to make; and I shall be glad if it be such as will allow me, with justice to my other creditors, to give you my note for the amount, or, if it be possible, to borrow it from a friend, which I have a hope of doing, and wipe the account entirely out of your books. . . . I am fully sensible of and thankful for the forbearance you have shown; but I cannot move a step in the way to give you satisfaction, and do justice to my other creditors, until the sum actually due to you is ascertained.” (1842.) *Gardner v. M'Mahon*, 3 Q. B. 561.

“What she (the principal debtor) may be short, I (the surety) will assist to make up.” Sufficient on proof of non-payment by principal debtor. (1845.) *Humphreys v. Jones*, 14 M. & W. 1.

“You must allow me a little time to manage with you about the £400 your mother gave me the receipt for.” (1850.) *Martin v. Geoghegan*, 13 Ir. L. R. 403.

“Should I receive the mortgage of Mr. Lynch, I will then be able to settle with you. . . . You may be assured that I am anxious our accounts should be arranged as soon as possible; nothing delays it but my having the means, which the Barna business, if settled, would enable me to do.” Sufficient on proof that the Barna mortgage debt (mortgage of an estate of Mr. Lynch's at Barna to the writer of the letter) was paid off within six years before action. (1851.) *Maunsell v. Hedges*, 2 Ir. C. L. Rep. 88.

Action on promissory notes. Application made for

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payment. Defendant wrote:—"I hope to be in H. very soon, when I trust everything will be arranged with W. (the creditor) agreeable to his wishes." The M.R. (Sir John Romilly) said that the letter, taken in conjunction with the application, could mean nothing but a promise to arrange the debt by payment of what was actually due. (1852.) *Edmonds v. Goater*, 15 Beav. 415.

A., to whom B. owed £200, secured by a promissory note of B. and two sureties, bought goods from B. to the value of £17. B. sent to A. £10 for interest on the money borrowed, and with it his bill for the £17 worth of goods. A. answered, "I beg to acknowledge the receipt of £10 cash and a bill amounting to £17, both of which sums I have placed to your credit. I have enclosed your bill; receipt it, and return the same by post." It did not appear whether B. ever sent back the bill receipted. The £200 with interest was afterwards paid by the sureties, and credit given for the £10, but not for the £17. B. sued the personal representative of A. for £17. The letter was held a sufficient acknowledgment of A.'s debt for £17 to B. (1853.) *Evans v. Simon*, 9 Exch. 282; 23 L. J. Exch. 16.

Plaintiff, having a claim for an account against defendant and his partner, wrote to defendant: "C. (defendant's partner), before he goes, ought to settle the B. & M. account, because if he is under any idea that there is a balance due to him, he is grossly mistaken." Defendant writes in answer:—"B. & M. I have had a long talk with my partner about this matter. He says and insists that there is a large balance coming to him; but I have put the matter right with him, and you and I must go into it and settle the account. I have allowed him a sum to satisfy him, as, if you remember, there was £1000 paid to you for your preliminary expenses to be

Sufficient Acknowledgments—continued.

accounted for. It is necessary we should sit down to this matter and put it on the square." *Held*, sufficient acknowledgment of the right to an account, and promise to pay anything that might be due to save the right to sue for an account in equity from being barred by the statute. (1854.) *Prance v. Simpson*, Kay, 678.

Promissory note given in 1834. Letter written by debtor in 1848, within six years of action brought:—"In my visit to you when I was at K., I purposed noticing the pecuniary obligation my dearest wife and myself were under to you, when my sudden departure deprived me of this opportunity. This money will be forthcoming whenever you require it, and indeed would have been liquidated long ago had not all my available funds been swallowed up. . . . The first opportunity I shall make it a point to repay you, with the grateful acknowledgments due to you; and, to prevent accidents or uncertainty, I have long previous to this mentioned the amount in my will to be paid to you. . . Believe me that, with my best acknowledgments, I own myself answerable for this debt; and, if it will suit you to grant me a little longer credit, I will most cheerfully discharge the amount to your order." In absence of proof of any other debt, the letter was held to be an acknowledgment of the promissory note. (1854.) *Spickernell v. Hotham*, Kay, 669.

"I regret much the necessity of Mr. Briggs's proceedings against me . . . as Adlard's executor; but what can I do between two fires? The legatees . . . threaten me, or at least do not assent to my paying Mr. Briggs's claim, though I confess I think it just in law and equity. I have therefore only to say, the sooner the Court decide the matter the better shall I be satisfied." "I not only do not dispute Mr. Briggs's claim, but I admit it, thinking the claim just. But I am compelled to refuse

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payment without an order of Court; and I much regret the necessity." *Held*, sufficient by Knight Bruce, L.J.; Turner, L.J., *contra*. (1854.) *Briggs v. Wilson*, 5 De G. M. & G. 12.

"I shall repeat my assurance to you of your being repaid your generous loan. Let matters remain as they are for a short time longer, and all will be right." (1857.) *Collis v. Stack*, 1 H. & N. 605; 26 L. J. Exch. 138.

"I have received your bill. It does not, I think, specify sufficiently to which cottages the work is done. . . . I shall feel obliged if you will more particularly explain, and take your agreements to H. (defendant's agent). It is my wish to settle your account immediately; but being at a distance, I wish everything very explicit and correct. I have asked H. to mark the agreements and send them to me, and I will return them by the first post with instructions to pay if correct." The jury found that the work was done. *Held*, sufficient acknowledgment. (1857.) *Sidwell v. Mason*, 2 H. & N. 306; 26 L. J. Exch. 407.

"I was always anxious to settle accounts with Mr. Holmes, he having received £3200 on my account. . . . I gave Mr. Holmes a list of creditors I wished paid. . . . If Mrs. Holmes can prove I owed her late husband any money for costs, or otherwise, I am willing to have it settled at once. . . . This is easily done by producing the receipts for the amount of money he had of mine in his hands, £3200." *Held*, a promise not qualified by a condition. (1858.) *Holmes v. Smith*, 7 Ir. C. L. Rep. 461; 8 Ir. C. L. Rep. 424.

"In reply to your statement of account I am ashamed

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the account has stood so long. I must beg to trespass on your kindness a short time longer, till a turn of trade takes place, as for some time things have been very flat.” (1859.) *Cornforth v. Smithard*, 5 H. & N. 13; 29 L. J. Exch. 228; 8 W. R. 8.

Two actions, one on a covenant in a mortgage deed to pay £100 and on a promissory note for £40, the other for balance of plaintiff’s bill of costs, £83 8s. 4d. “I am going to leave my situation on the 1st November, 1857, and when the policy is paid on the 29th October, I hope you will have the whole of your accounts ready for me, as I hope to be with you on that day.” “Mr. V., when here on Saturday, stated that the amount due against me was about £280. Of course this includes £100 and interest that I had some years since, and the £40 promissory note that I jointly signed with the late Mr. B. Of course you are aware that you have £25 to my credit.” *Held* (no question arising as to the £100), sufficient acknowledgment both of the promissory note and of the bill of costs. (1859.) *Godwin v. Culley*, and *Edwards and Godwin v. Culley*, 4 H. & N. 373.

The solicitor for the defendant, the administrator of an intestate, by notice required the plaintiff “to proceed to tax any bill or bills of costs properly payable” to the plaintiff out of the assets of the intestate, “the administrator hereby undertaking to pay any sum which may be found to be due on foot of said costs (after all fair credits) when same shall be taxed and certified.” *Held*, acknowledgment that the costs were due subject to taxation and an allowance of fair credits. (1863.) *Archer v. Leonard*, 15 Ir. Ch. Rep. 267.

“As soon as I can get any money, you shall have it. My father and mother are both in a very precarious state.

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The time may not be long before I shall be able to discharge my debt to you." "I make no doubt but you have been expecting to hear from me long before this; but my parents are both in the land of the living, therefore I have not had it in my power to pay you, or I should have done so . . . I will pay you as soon as I get it in my power; before, I cannot. I have nothing to pay with or I would willingly do it. You can look to nobody for the money but me; but with patience you will one day get your money." *Held*, a promise to pay on the death of the defendant's father and mother sufficient to take the case out of the statute. (1864.) *Hammond v. Smith*, 10 Jur. N. S. 117; 33 Beav. 452.

The solicitor to the executors of the debtor wrote to the solicitor for the administratrix of the creditor:—"Mr. S.'s executors have handed me the costs and account on foot of rents furnished them by you as Mr. H.'s solicitor, on 5th March, 1854, and at which time I may remark the entire of the former sum, save £25 15s. 11d., was barred by the Statute of Limitations. . . . but the instructions I received were to look at the matter fairly, and if anything appeared due to settle it, notwithstanding Mr. H. not being legally entitled to recover." . . . "The executors are not in any way called on to pay any sum unless you can within a week show me in any reasonable way that Mr. Holmes did not act over these properties as Mr. S.'s agent." It was found as a fact that H. was not agent on S.'s property. (1865.) *Leland v. Murphy*, 16 Ir. Ch. Rep. 500.

"It is quite true I have not sent you any money for years, but really I have none of my own. We just manage to exist on my wife's, at least on what is left of hers. We have hard work to get on, but I will try to pay you a little at a time, if you will let me. I am sure

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— that I am anxious to get out of your debt. I will endeavour to send you a little next week.” (1866.) *Lee v. Wilmot*, L. R. 1 Exch. 364; 35 L. J. Exch. 175.

“ My state of health renders me anxious to know the exact relation I hold towards you. I must, therefore, once more request you to furnish me with an account of my debt to you. On looking over my papers with a view of ascertaining the amount, I have found some inaccuracies of calculation in the dockets which you from time to time gave me; and in general, sums lent by you have got so mixed up with receipts of yours from me that I have got rather confused by them. . . . I think your own suggestion the best, that we should arrange the matter between ourselves. But to do so, I must have from you a full account from the beginning of all the sums you paid for or to me. The simplest and fairest way will be for you to make out from your books a list of such sums, with the dates and particulars of each. I can then check it by the bills and dockets in my possession, and make out a list of the sums for which I have your receipts. We can then compare them together, and the amount of the latter, *plus* the amount due by you for lodgings and fire, deducted from the sum total of your list, will show clearly the position we hold to each other.” (1869.) *Burrows v. Baker*, 3 Ir. R. Eq. 596.

Debtor in 1846 gave a promissory note to B. and S. payable three months after date to B. or S. In 1866, after the death of B., the debtor, on S. applying for the payment of the debt, wrote on the back of the note his (the debtor's) name and the date 1866. (1871.) *Bourdin v. Greenwood*, L. R. 13 Eq. 281; 41 L. J. Ch. 73.

“ I suppose I and my brother Thomas signed the note

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of hand to serve my brother Robert; therefore we trust you will use such means that you know will make him pay (he having plenty by him) before you ask us, you being able to do that which we should not like to take in law with a brother. . . . You had better send him a writ at once." *Held*, acknowledgment of liability to pay the note on plaintiff failing to get the amount of the debt from the principal debtor. (1871.) *Fisk v. Mitchell*, 24 L. T. 272.

"It is totally out of my power at the present time to liquidate the whole, or even part (of the debt), but, on the contrary, it would much alter my position, and possibly prove my ruin. I am in the anticipation of a better position, which your proceedings against me would entirely debar me from, and should I be successful, Mrs. Wilby's claim shall have my first consideration. Meanwhile you, as a stranger to me, I shall be pleased to pay a reasonable interest on the amount. But do, I beg once more, not think of law, as it would entirely crush me. Please shew this letter to Mrs. Wilby, and tell her the claim has not been forgotten by me, and shall be liquidated at the earliest opportunity possible." "I can assure you at present it is utterly out of my power to do anything. I am willing to endeavour to pay it off by easy instalments. They must be small, as my salary is quite nominal; or I am willing to pay you any reasonable interest to let the matter remain for the present. Let me beg of you to accept one of my propositions, for I really cannot see you will do any good by issuing process; but, on the contrary, you may lose me my appointment, and the chance of payment then would be more remote." (1875.) *Wilby v. Elgee*, L. R. 10 C. P. 497.

"The old account between us, which has been standing over so long, has not escaped our memory, and as soon as

Sufficient Acknowledgments—continued.

we get our affairs arranged we will see you are paid; perhaps, in the meantime, you will let your clerk send me an account of how it stands." (1875.) *Chasemore v. Turner*, L. R. 10 Q. B. 500.

"I shall be obliged to you to send in your account made up to Christmas last. I shall have much work to be done this spring, but cannot give further orders until this be done." "You have not answered my note. I beg of you to send in your account, as I particularly require it in the course of this week." (1876.) *Quincey v. Sharpe*, 1 Exch. D. 72.

"I return to Shepperton about Easter. If you send me there the particulars of your account with vouchers, I shall have it examined, and cheque sent to you for the amount due; but you must be under some great mistake in supposing that the amount due to you is anything like the sum you now claim." (1877.) *Skeet v. Lindsey*, 2 Exch. D. 314.

The plaintiff changed his solicitors, and gave his new solicitors written authority to obtain from the defendant, his old solicitor, all deeds, &c., in the possession of the latter, and also to obtain and receive from him an account of his dealings with the plaintiff's land; and authorised the defendant to deliver to the new solicitors such deeds and account. The new solicitors sent this document to the defendant, who, in reply, wrote as follows:—"Does your client require my bill of costs from the date when I became his sole agent, or how otherwise?" The new solicitors wrote back, "Our client only requires you to deliver particulars of any unsettled bill of costs you may have against him." *Held*, that the last letter was a sufficient acknowledgment of items in the defendant's bill of costs more than six years old. (1889.) *Curwen v. Milburn*, 42 Ch. D. 424.

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The plaintiffs were the executors of A. and the defendant the executor of B. On November 19th, 1882, A. lent B. £3000 for the purpose of buying a seat on the New York Stock Exchange. In 1885 B. wrote to A.'s son, one of the plaintiffs: "The great kindness of your father on every occasion, and more especially the money that he loaned me to purchase my seat on the New York Stock Exchange, place me now in your debt. . . . I must now leave it entirely to your generosity whether you will have me liquidate the loan I have mentioned on the sale of my seat in New York." The plaintiff replied that he and his co-executor could not forego the payment of the £3000. Action brought in December, 1888. *Held*, conditional promise to pay upon the sale, and, as sale had taken place, debt was taken out of the statute. (1889.) *Duke of Buccleugh v. Eden*, 61 L. T. 360.

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"B. (the plaintiff) quitted my service in 1816. I owed him six guineas, but I have his receipt in full of all demands; I shall search for it, and I shall let you know in the event of my not being able to find it." (1827.) *Brydges v. Plumptre*, 9 D. & R. 746.

I.O.U. £100. CHAS. ROBARTS, 30th July, 1821.

August 17th. Received £50. CHAS. ROBARTS.

The last item above was within the six years. *Held*, that it was not an acknowledgment sufficient to take the £100 out of the statute. (1828.) *Robarts v. Robarts*, 1 M. & P. 487.

Defendant said he would help the plaintiff to £5 if he could. Debt £20. Ability not proved. (1829.) *Gould v. Shirley*, 2 M. & P. 581.

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— “In the present stage of my affairs I shall feel much indebted to Mr. F. (plaintiff) to withdraw his outlawry; and as soon as common decency and my situation will allow, Mr. F.’s claim, with that of others, shall receive that attention that, as an honourable man, I consider them to deserve, and it has been and is my intention to pay them. I cannot conclude without saying I must be allowed time to arrange my affairs; and if I am proceeded against, any exertion of mine will be rendered abortive.” . . . “I am ready and willing to do anything and everything to satisfy Mr. F. and all my creditors; and my only regret is, that by the way my father has left me, I am totally unable to do more than give up (which I do by deed) almost the whole of my income to my creditors, and no man can do more. . . . I am not worth one pound.” (1830.) *Fearn v. Lewis*, 6 Bingh. 349.

Letter written, “which is not to be used in prejudice of my rights now or in any future arrangement that may be made or instituted.” Not sufficient acknowledgment. Clearly a conditional statement, *per* Tindal, C.J. (1830.) *Cory v. Bretton*, 4 C. & P. 462.

Defendant wrote that he was incapable then of paying the money, but he would pay as soon as he had it in his power to do so. No evidence of ability. (1830.) *Haydon v. Williams*, 7 Bingh. 163.

“We are waiting a remittance from Liverpool against beef we sent to sell, and when it comes we shall send you the amount of the bill, and thanks for waiting since it became due.” No evidence of the remittance having been received. (1831.) *Hodgens v. Graham*, Alcock & Napier, 49.

Defendant, by a deed reciting that he was indebted to

*Insufficient Acknowledgments—continued.*PART I.
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the plaintiff and others, assigned his property to plaintiff and another in trust, to pay all such creditors as should sign the schedule of debts annexed. Proviso, that if all did not sign, the deed should be void. Plaintiff never signed, nor was the amount of his debt stated. (1831.) *Kennett v. Milbank*, 8 Bingh. 38.

“I have hitherto deferred writing to you regarding your demand upon me, in consequence of some family arrangements through which I should be enabled to discharge your account and which were in progress not having been completed. An appointment of sufficient funds has been made for this purpose of which A. is one of the trustees, to whom I have given a statement of your account. It will, however, be unavoidable that some time must elapse before the trustees can be in cash to make these payments, but I have A.’s authority to refer you to him for any further information you may deem requisite on this subject.” (1832.) *Whippy v. Hillary*, 3 B. & Ad. 399.

“I do hereby charge my reversionary interest when the same shall fall into possession and be rendered available to my use with the payment of the sum of £108 8s. 9d. to Mr. M. (the plaintiff), to carry lawful interest.” Insufficient acknowledgment that £108 8s. 9d. was owing. (1833.) *Martin v. Knowles*, 1 Nev. & Man. 421.

“In reply to your application of the 19th inst. for the payment of £89 10s. 11½d. to B. (plaintiff), I beg to say that it is a claim I am by no means prepared to admit to the full extent, and to make the following observations respecting it. Of that sum £68 3s. 8d. is made up of items for business and materials stated to have been done and furnished between the years 1817 and 1824, a period during which I was concerned in two successive

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partnerships, to one or other of whom the accounts B. (plaintiff) was entitled to recover ought to have been charged. Having at different times wound up both those concerns, and quitted Carmarthen as long back as 1824, I was surprised to receive B.'s bill in 1829, five years afterwards. And it is certainly a little strange that he should then send me a charge of so old a date, when, if any account was due, it could hardly be expected that the means would remain of ascertaining its correctness. I cannot, therefore, allow that I am liable to pay any part of the account previous to the year 1825; but, as I anticipate being in Carmarthen shortly, I will then communicate with B. personally respecting it." Cheque sent for remainder. *Held*, insufficient to take £68 3s. 8d. out of the statute. (1833.) *Brigstocke v. Smith*, 1 C. & M. 483.

"I shall be happy to pay you both interest and principal as soon as convenient." No evidence of ability. (1834.) *Edmunds v. Downes*, 2 C. & M. 459.

"You know I gave up all my affairs, and therefore I consider I have nothing to do with your claim, nor shall I; I wish you would make me bankrupt. I would rather go to gaol than pay you in preference to others." (1835.) *Linsell v. Bonsor*, 2 Bingh. N. C. 241.

"I will see D. or write to him. I have no doubt he has paid it (the debt); if by chance he has not paid it, it is very fit it should be." (1837.) *Poynder v. Bluck*, 5 Dow. P. C. 570.

"Since the receipt of your letter (and, indeed, for some time previously), I have been in almost daily expectation of being enabled to give a satisfactory reply to your first application respecting the demand of M. (plaintiff) against me. I propose being in Oxford to-

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morrow morning, when I will call upon you on the matter.” (1838.) *Morrell v. Frith*, 3 M. & W. 402.

“I give the above accounts to you; so you must collect them, and pay yourself, and you and me will then be clear.” (1838.) *Routledge v. Ramsay*, 8 A. & E. 221.

“Send me in any bill or what demand you have to make on me, and if just I shall not give you the trouble of going to law.” (1842.) *Spong v. Wright*, 9 M. & W. 629.

A., the holder for value of certain promissory notes made by defendant, being indebted to the defendant and another as executors on a larger amount, agreed that the amount of the notes should be set-off against and satisfied by the same amount of A.’s debt. Defendant gave A. a paper, in which the amount of the several notes and of the interest was mentioned, at the foot of which the defendant wrote, “Approved due to A.” A. retained possession of the notes, and afterwards endorsed them to the plaintiff for value. *Held*, the paper was not such an acknowledgment as to take the case out of the statute, as in the circumstances no promise to pay the notes otherwise than by setting them off against A.’s debt could be inferred. (1843.) *Cripps v. Davis*, 12 M. & W. 159.

“I assure you I will not fail to meet Mr. Hart (plaintiff) on fair terms, and have now a hope that before perhaps a week from this date I shall have it in my power to pay him, at all events, a portion of the debt, when we shall settle about the liquidation of the balance.” (1845.) *Hart v. Prendergast*, 14 M. & W. 741.

“I directed Mr. E. last year to apply to you for your bill in order that we might settle the tithe account.” (1849.) *Williams v. Griffith*, 3 Exch. 335.

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“I never shall be able to pay you in cash; but you may have any of the goods we have at the Pantech-nicon by paying the expenses incurred thereon, without which they cannot be taken out.” (1851.) *Cawley v. Furnell*, 20 L. J. C. P. 197.

In answer to a letter from the plaintiff asking for payment of £275, the defendant wrote referring to arrangements for the payment of another debt by a certain date: “after which I am in hopes that I shall be able to transfer the £5000 mortgage to enable me to clear off the whole that may be standing against me.” (1852.) *Smith v. Thorne*, 18 Q. B. 134.

“I regret much the necessity of Mr. Briggs’s proceedings against me as A.’s executor; but what can I do between two fires? The legatees . . . threaten me, or at least do not assent to my paying Mr. Briggs’s claim, though I confess I think it just in law and equity. I have, therefore, only to say the sooner the Court decides the matter, the better shall I be satisfied . . . I not only do not dispute Mr. Briggs’s claim, but I admit it, thinking the claim just; but I am compelled to refuse payment without an order of Court, and I much regret the necessity.” *Held*, insufficient by Turner, L.J.; Knight Bruce, L.J., *contra*. (1854.) *Briggs v. Wilson*, 5 D. M. & G. 12.

“It is agreed that B. in his general account shall give credit to A. for bricks delivered to the trustees of Park Place Chapel.” *Held*, not such an acknowledgment as to give B. a right to an account against A.’s estate for more than six years. (1855.) *Hughes v. Paramore*, 24 L. J. Ch. 681.

“I do not wish to avail myself of the statute to refuse

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payment of the debt alluded to in your note ; but I have not the means of settling it. My situation as a salaried clerk does not afford me the means of laying by a shilling, but in course of time, if I continue in my present employment, I may reap the benefit of my services in an augmentation of my salary to enable me to propose some satisfactory arrangement with you." Proof was given of ability to pay. *Held*, not a promise either absolute or conditional on ability to pay. (1856.) *Rackham v. Marriott*, 1 H. & N. 234; 25 L. J. Exch. 324; 2 H. & N. 196; 26 L. J. Exch. 315. (See per Pollock, C.B., in *Sidwell v. Mason*, 26 L. J. Exch. 408. "That (*i.e.* *Rackham v. Marriott*) is an extreme case the other way. We were a long time in arriving at the conclusion, and a hair's breadth would have turned the decision the other way." See 2 H. & N. 308.)

"I am not conscious of ever having had this bill put before me till now, nor did I know that it was owing. I am much annoyed that her bill should have been so long unsettled." (1858.) *Collinson v. Margesson*, 27 L. J. Exch. 305

"If in funds (I) would immediately pay the money and take the bill out of your hands." (1860.) *Richardson v. Barry*, 29 Beav. 22.

"I have received a letter from Messrs. P. and L., solicitors, requesting me to pay you an account of £40 9s. 6d. I have no wish to have anything to do with lawyers; much less do I wish to deny a just debt. I cannot, however, get rid of the notion that my account with you was settled when I left the army in 1851. But, as you declare it was not settled, I am willing to pay you £10 per annum until it is liquidated. Should this proposal meet with your approbation, we

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can make arrangements accordingly.” The proposal was not accepted. (1861.) *Buckmaster v. Russell*, 10 C. B. N. S. 745.

Letter from surety :—“ I consent to your receiving the dividend under H.’s (the principal debtor’s) assignment, and do agree that your doing so shall not prejudice your claim on me for the same debt.” (1863.) *Cockrill v. Sparkes*, 1 H. & C. 699; 32 L. J. Exch. 118.

“ I am now quite ready to go into the account, but it is necessary to have an appointment to dispose of it satisfactorily. I understood you were to be here on the 29th of November, otherwise I should, before this, have gone over to London. I will, on hearing from you, go over and vouch the account.” “ I am going shortly to London, and will take with me the vouchers and papers necessary to close what remains open in the account.” (1867.) *Crawford v. Crawford*, 2 Ir. R. Eq. 166.

“ I should be very sorry that Mr. Cassidy or any one else should lose by me, and if I can get hold of the groom I had then, and prove satisfactorily to myself that he is due anything, I should be very sorry that he should not get it; but if he chooses to take me to court, he may do so, and do his worst.” “ I think the best way of disposing of this business would be through an agent; and I will write to a man of business . . . to confer with you on the subject; but, at the same time, I might repudiate the account, as I knew nothing of it; but if Mr. Cassidy has any claim on me, which I much doubt, I would wish the matter to be arranged.” (1867.) *Cassidy v. Firman*, 1 Ir. R. C. L. 8.

“ A paper has been received without letter or explanation of any kind purporting to be a memorandum

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of account between you and the company, which is altogether incorrect, both in principle and detail, omitting all deductions and credits to which this company are entitled, and which would leave the balance considerably in their favour. I am, however, authorized to say that this company are still willing, as they have all along been, to have all accounts and questions between you and them decided by arbitration according to your contract, and they again call upon you to concur with them in the necessary steps for that purpose . . . This is, of course, wholly without prejudice." No arbitration ever took place. (1871.) *In re River Steamer Company, Mitchell's Claim*, L. R. 6 Ch. 822.

Debt incurred in 1865. Defendant writes in 1874 :— "Believe me that I never lose out of sight my obligations towards you, and that I shall be glad, as soon as my position becomes somewhat better, to begin again and continue with my instalments." In 1876 he wrote : "Since the present year I find myself in a more hopeful sphere, which, as soon as the general crisis gives way, will render to me more than necessary for living." No proof that the "general crisis" had given way. (1878.) *Meyerhoff v. Froehlich*, 3 C. P. D. 333 ; 4 C. P. D. 63.

A., trustee of a settlement by which an estate was settled on trust during joint lives of defendant and his wife, to pay the rents to the defendant's wife for her life for her separate use without power of anticipation, lent defendant money in 1846 ; for some time up to 1859 the rents were applied to the payment of the debt with the wife's consent. In 1879 the defendant wrote to A. :—"I thank you for your very kind intention to give up the rent of (the estate) next Christmas, but I am happy to say at that time both principal and interest

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will have been paid in full.” (1884.) *Green v. Humphreys*, 26 Ch. D. 474.

“I was in hopes of being able to send you some coin by small instalments, but as I have been ordered home, the matter must be in abeyance a bit longer, which won’t ruin you. I know you must live in hopes as I do, for a good time is rather long coming. I hope your son has not made himself officious by going to my employer and making inquiries about me and my affairs, because if he has I shall be annoyed very much indeed, and I can assure you such behaviour would not induce me to put myself out to attempt to square off your account. I think you ought to know me by this time; when I have had the means you have pot-luck, whether from India, the West Coast of Africa, or at home.” (1884.) *Jupp v. Powell*, 1 Cab. & E. 349 (affirmed in C. A.).

“I will let you have some (*i.e.* money) the moment it is safe to borrow it Will you make out your account and send it to me? I will send it you as soon as possible—send your account next week I will send you a cheque as soon as I can . . . I will send some coin as soon as ever I can.” No proof of ability to pay. (1887.) *In re Bethell. Bethell v. Bethell*, 34 Ch. D. 561.

Defendant (executrix) in an affidavit made in reference to the claims of the creditors of the estate, inserted particulars of a claim thus :—

Name of Claimants.	Particulars of Claim.	Amount Claimed.
B. & Co.	Contingent claim in respect of mortgage executed by the C. Company, Limited.	£6000 and interest.

Amount further to be allowed uncertain.

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Held, insufficient, did not amount to a promise to pay. (1890.) *In re Wolmershausen*. *Wolmershausen v. Wolmershausen*, 62 L. T. 541.

The cases of *Dabbs v. Humphries* (1), *Dodson v. Mackey* (2), and *Bird v. Gammon* (3), and also *Briggs v. Wilson* (4), as decided by Knight Bruce, L.J., seem hardly consistent with principle, for it is submitted that in each of those cases the expressions used were such as to prevent the implication of a promise to pay. The same remark applies to *Cornforth v. Smithard* (5), which, although acquiesced in by so many learned judges, can scarcely, considering the whole of the terms of the acknowledgment, be consistent with principle, and is not easily to be reconciled with *Fearn v. Lewis* (6), *Hodgens v. Graham* (7), and *Rackham v. Marriott* (8). And it is submitted that at all events proof should have been given in *Cornforth v. Smithard*, that the contingency mentioned had happened, namely, that a turn of trade had taken place.

In the case of an ordinary acknowledgment, as the debt is not extinguished by the operation of the statute, there would seem to be no reason why the acknowledgment should not have the same effect, whether made before or after the expiration of six years from the accrual of the cause of action, provided it was made within six years of action brought, and it has been so decided (9).

Acknowledgments made before and after six years from the accrual of the cause of action.

(1) 10 Bingham, 446; *ante*, p. 70.

(2) 8 A. & E. 225, n; *ante*, p. 70.

(3) 3 Bingham, N. C. 883; 5 Scott, 213; *ante*, p. 70.

(4) 5 De G. M. & G. 12; *ante*, p. 74.

(5) 5 H. & N. 13; 29 L. J. Exch. 228; 8 W. R. 8; *ante*, p. 75.

(6) 6 Bingham, 349; *ante*, p. 82.

(7) Alc. & Nap. 49; *ante*, p. 82.

(8) 1 H. & N. 234; affirmed in Exch. Ch. 2 H. & N. 196; 26 L. J. Exch. 315; *ante*, p. 86.

(9) *Williams v. Gunn*, Fortescue, 180; *Spickernell v. Hotham*, Kay, 669; *Willins v. Smith*, 4 E. & B., at p. 185, *per* Coleridge, J.

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In the case of *Cornforth v. Smithard* (1), above referred to, a distinction was made by Pollock, C.B., and (according to the *Weekly Reporter*) by Bramwell, B., between the nature of the acknowledgment required before and after the expiration of the six years. Pollock, C.B., as reported in *Hurlston and Norman*, says, "There is a great difference between the construction to be put on a letter written a short time after the debt has been contracted and one written after the debt is already barred. In the latter case effect would properly be given to anything which savours of a condition; but where a person, being then a debtor, who has no right to time, writes a letter asking for time, the reasonable construction is, that it is no condition, and that the writer has no intention of imposing a condition." The words are somewhat differently given in the *Weekly Reporter*. The learned judge could hardly have meant that effect should not be given to an express condition or qualification in all cases alike, but what he seems to have meant was that stronger expressions were necessary to annex a condition or qualification made within, than to one made after the six years. This view, however, seems hardly reconcileable with the decisions and reasons of Best, C.J., in *Scales v. Jacob* (2), and of Tindal, C.J., in *Haydon v. Williams* (3).

Acknowledgment
by an
executor.

It has been said, but erroneously, as is submitted for the reasons to be mentioned presently, that an acknowledgment by an executor merely of the existence of a debt, is not sufficient to take the debt out of the statute, and that there must be an express promise to pay the debt (4). This was first laid down by Lord Tenterden, then Abbott, C.J., in a case at *Nisi Prius* (5), and in another case (6) Bayley, J., said the language there

(1) 5 H. & N. 13; 29 L. J. Exch. 228; 8 W. R. 8; *ante*, p. 75.

(2) 3 Bingh. 638.

(3) 7 Bingh. 163, 168.

(4) Williams on Executors, 7th edition, p. 1946; 8th edition, 1957.

(5) *Tullock v. Dunn*, Ry. & Mood. 416.

(6) *McCulloch v. Dawes*, 9 D. & R. 43.

relied on could not properly be construed into a promise to pay a debt by any one, "much less by an executor."

The judgment of Parke, B., in *Scholey v. Walton* (1) seems to have been thought to support this doctrine. But the observations of Parke, B., in that case are, in fact, confined to that part of the decision in *Tullock v. Dunn* (2), which lays down that even the express promise of one of several executors will not bind the others. The effect of an acknowledgment by one of several executors will be subsequently considered; but apart from this question, it is difficult to see why a promise may not be implied from an acknowledgment made by an executor in words which, if used by his testator, would imply a promise. No distinction seems ever to have been taken between the effect of payment of interest or part payment of principal by executors and that of payment by the original debtor, and such payment, as will be seen hereafter (3), and, as Turner, V.-C., expressly laid down in the case of an executor (4), takes a debt out of the statute only because it implies a promise. There seems, therefore, no reason why a promise should not be implied from an acknowledgment by an executor, though not containing an express promise, just as much as from a payment made by him. And in *Briggs v. Wilson* (5), where the acknowledgment by the executors was nearly in the same words as in *McCulloch v. Dawes*, Turner, L.J., in deciding that it was insufficient, did not suggest that the effect of an acknowledgment by an executor was to be governed by a different principle than the effect of an acknowledgment by the debtor himself, while Knight Bruce, L.J., held that the acknowledgment was sufficient, though in so holding he seems to have carried the implication by law of a

(1) 12 M. & W. 510.

(2) *Tullock v. Dunn*, Ry. & Mood. 416.

(3) See Chapter V.

(4) *Fordham v. Wallis*, 10 Hare, 217; 22 L. J. Ch. 548.

(5) 5 De G. M. & G. 12.

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Promise
not to
plead the
statute.

promise from words not amounting to an express promise further than the cases would warrant under any circumstances (1).

It is doubtful whether a promise not to plead the statute will operate as an acknowledgment of the debt so as to prevent the person who so promised from afterwards setting up the statute. It would appear from the judgments of Denman, C.J., and Patteson, J., in *Gardner v. M'Mahon* (2), that such a promise would have that effect. In that case, however, the promise was: "I am ready to put it out of my power to take advantage of that Act (*i.e.* the statute), and will immediately give you my note for whatever amount is due," and was accompanied by other expressions which Wightman, J., seems to have thought of themselves a sufficient acknowledgment. But a promise not to plead the statute made in terms consistent with an intention to dispute the claim on other grounds cannot, it is apprehended, be sufficient, as it is not an unqualified acknowledgment from which a promise to pay ought to be implied. This view is supported by a dictum of Lord Campbell's (3), that an agreement not to take advantage of the statute in consideration of an inquiry into the merits of a disputed claim, would not prevent the statute being set up against the original claim. It is not, however, clear that Lord Campbell was there referring to a written promise not to plead the statute. There can be no doubt that if there is any consideration to support a promise not to plead the statute an action will lie, as suggested by Lord Campbell, for the breach of it.

Reply of
such a
promise.

A promise not to plead the statute, if made for good consideration, might now by virtue of the Judicature

(1) See *ante*, pp. 74 & 86.

(2) 3 Q. B. 561; and see *per* Romilly, M.R. *Fuller v. Redman* (No. 2), 26 Beav. 619, and *Bewley v. Power*, Hayes & Jones, 368.

(3) *East India Company v. Paul*, 7 Moore, P. C. C. 85, at p. 112.

Act, 1873, s. 24, be pleaded as a good reply to a defence of the statute (1).

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When it was held that an acknowledgment operated merely to rebut the presumption of payment, it followed almost as a necessary consequence, that an acknowledgment after action took a debt out of the statute (2). But now an acknowledgment after action brought has no effect whatever (3).

Acknowledgment
after
action.

So it was formerly consistent with principle, that an acknowledgment to a stranger should be held sufficient (4), and even since the doctrine of presumption has been overruled, there has been a decision to the same effect (5), which is supported by a dictum of Wigram, V.-C. (6). But now it is settled law that an acknowledgment to a stranger is inoperative (7). The case of *Clark v. Hougham* (8) would probably even now be decided as it was, but on the ground that the acknowledgment was made to a third person on behalf of himself and the plaintiff, and that the plaintiff afterwards adopted and ratified the agency, and there is no reason why an acknowledgment to an agent should not have the same effect as an acknowledgment to the principal (9).

Acknowledgment
to a
stranger.

(1) See *Trill v. Lade*, 6 Jur. 272, and chapter on Pleading, Part VIII. Ch. I.

(2) *Yea v. Fouraker*, 2 Burr. 1099; *Thornton v. Illingworth*, 2 B. & C. 824; *Rucker v. Hannay*, 4 East, 604, n.; *Lloyd v. Maund*, 2 T. R. 760.

(3) *Bateman v. Pinder*, 3 Q. B. 574.

(4) *Richardson v. Fen*, Loft 86; *Mountstephen v. Brooke*, 3 B. & Ald. 141; *Halliday v. Ward*, 3 Campb. 32; *Clark v. Hougham*, 2 B. & C. 149.

(5) *Smith v. Poole*, 12 Sim. 17. See *Spollan v. Magan*, 1 Ir. C. L. R. 691; *In re Littles*, 10 Ir. Eq. R. 275.

(6) *Courtenay v. Williams*, 3 Hare, 549.

(7) *Grenfell v. Girdlestone*, 2 Y. & C. Exch. 676; *Moodie v. Bannister*, 4 Drew. 439; 28 L. J. Ch. 883; *Godwin v. Culley*, 4 H. & N. 373; *Fuller v. Redman*, 26 Beav. 614; *Howcutt v. Bonser*, 3 Exch. 500; *Stamford, &c., Co. v. Smith*, L. R. (1892) 1 Q. B. 765; *Rogers v. Quinn*, 26 L. R. Ir. 136.

(8) 2 B. & C. 149.

(9) See *Bewley v. Power*, Hayes & Jones, 368; *Edmonds v. Goater*, 15 Beav. 415; 21 L. J. Ch. 290.

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OH. IV.

Resolution
of a board.

Where the Commissioners under a town improvement Act passed a resolution adopting a report of their finance committee, which contained an acknowledgment of the plaintiff's debt, but the resolution was not communicated to the plaintiff, it was held that there was no sufficient acknowledgment (1). In another case, where the plaintiff was present as one of a board of directors by whom a resolution, put forward as an acknowledgment, was passed, it would seem that there was sufficient communication to the plaintiff; but Wood, V.-C., expressed a strong opinion that no resolution come to under such circumstances could be available as an acknowledgment; he seems to have thought that, as the plaintiff was acting as one of the promisors, he could not be also one of the promisees (2).

Acknowledgment
by an
agent.

19 & 20
Vict. c. 97,
s. 13.

The provision in Lord Tenterden's Act being that the acknowledgment is to be in writing, "signed by the party chargeable thereby," it was held that an acknowledgment signed by an agent was insufficient (3). Now, however, the Mercantile Law Amendment Act, 1856, sect. 13, provides as follows:—

"An acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby, duly authorised to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself."

This section was held not to apply to cases where the acknowledgment was made before the passing of the Act (29 July 1856), but applies to all acknowledgments made since that date, though the debt acknowledged was contracted before (4).

(1) *Bush v. Martin*, 2 H. & C. 311; 33 L. J. Exch. 17.

(2) *Lowndes v. Garnett, &c., Co.*, 33 L. J. Ch. 418.

(3) *Hyde v. Johnson*, 2 Bingham N. C. 776; 3 Scott, 289; *Gibson v. Baghott*, 5 C. & P. 211; *Clark v. Alexander*, 8 Scott, N. R. 147.

(4) *Archer v. Leonard*, 15 Ir. Ch. R. 267; *Leland v. Murphy*, 16 Ir. Ch. R. 500.

This enactment brings the law with respect to written acknowledgments by an agent back to the same state in which it was before Lord Tenterden's Act, before which an acknowledgment by an agent was as valid as part payment or payment of interest by an agent has always been (1).

The question whether the agent had or had not authority to make the acknowledgment must be always a question of fact to be decided according to the particular circumstances of each case. In *Curwen v. Milburn* (2), where the plaintiff changed his solicitor and authorised his new solicitor to obtain and receive from his former solicitor all deeds and other documents, and also an account of his dealings and transactions in the plaintiff's land "since he was appointed my solicitor many years ago, or for such other period as you may think fit," North, J., held that the new solicitor had authority to make an acknowledgment to take out of the statute items that were barred; the decision of North, J., was affirmed in the Court of Appeal, but no opinion was expressed on this point (3).

In *Ingram v. Little* (4), where a debtor's wife sent to a creditor an unsigned letter, written by her at the debtor's dictation, in an envelope along with a letter signed by her in her own name, and referring to the unsigned letter, showing that she had written it on her husband's behalf, Cave, J., held that there was no sufficient signature to satisfy sect. 13 of the Mercantile Law Amendment Act. But the position of the signature is immaterial, so long as it verifies the whole acknowledgment (5).

(1) *Burt v. Palmer*, 5 Esp. 145; *Williams v. Innes*, 1 Camp. 364; *Anderson v. Sanderson*, Holt, 591. See *Gregory v. Parker*, 1 Campb. 394; and see *post*, Chap. V.

(2) 42 Ch. D. 424.

(3) *Curwen v. Milburn*, 42 Ch. D. 434.

(4) Cab. & Ell. 186.

(5) *Holmes v. Mackrell*, 3 C. B. N. S. 789.

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Whether
acknow-
ledgment
to be con-
strued by
judge or
jury.

The construction of the acknowledgment, even when contained in a single document, was formerly considered the province of the jury (1). Afterwards this point seems to have been considered doubtful (2). It is now settled that no exception is to be made to the general rule that the construction of a document is for the Court alone, but where the document is connected with extrinsic evidence affecting the construction, it is a question for the jury (3).

Amount
need not be
expressed.

It is not necessary that the acknowledgment relied on should state a definite amount. If some debt is acknowledged, it is even immaterial that the correctness of the amount claimed is disputed (4). The amount of the debt must of course be proved at the trial, or the damages will be merely nominal (5). In *Cheslyn v. Dalby* (6) a deed executed by the parties recited "that the defendant was indebted to the plaintiff, but the amount was not ascertained, and that the defendant was willing to pay the amount to be ascertained as therein mentioned." This was held to be an absolute promise to pay the amount as proved at the trial. So a letter, undertaking to pay a solicitor any sum which might be found due to him for costs, when the same should be taxed and

(1) *Lloyd v. Maund*, 2 T. R. 760; *Rucker v. Hannay*, 4 East, 604, n.; *Bird v. Gammon*, 3 Bingh. N. C. 883; 5 Scott, 213; *Frost v. Bengough*, 1 Bing. 266; *Colledge v. Horn*, 3 Bing. 119.

(2) *Dodson v. Mackey*, 8 A. & E. 225, n.; and see *Bucket v. Church*, 9 C. & P. 209; *Linsell v. Bonsor*, 2 Bingh. N. C. 241.

(3) *Routledge v. Ramsay*, 8 A. & E. 221; *Morrell v. Frith*, 3 M. & W. 402; *Collis v. Stack*, 1 H. & N. 605; 26 L. J. Exch. 138.

(4) See *Haydon v. Williams*, 7 Bing. 163; *Kennett v. Milbank*, 8 Bing. 38; *Courtenay v. Williams*, 3 Hare, 549; *Richardson v. Fen*, Lofft 86; *Colledge v. Horn*, 3 Bing. 119; *Rendell v. Carpenter*, 2 Y. & J. 484; *Lechmere v. Fletcher*, 1 C. & M. 623; *Bird v. Gammon*, 3 Bing. N. C. 883; 5 Scott, 213; *Waller v. Lacy*, 1 Scott, N. R. 186; *Gardner v. McMahon*, 3 Q. B. 561; *Sidwell v. Mason*, 2 H. & N. 306; 26 L. J. Exch. 407; *Edwards v. Culley*, 4 H. & N. 377; *Skeet v. Lindsay*, 2 Exch. D. 314.

(5) *Dickenson v. Hatfield*, 5 C. & P. 46; 1 M. & R. 141; 2 M. & M. 141.

(6) 4 Y. & C. Exch. 238.

certified, was held to take the amount as settled by taxation out of the statute (1).

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The case of *Prance v. Simpson* (2) rests upon analogous grounds to the cases referred to above. That was a bill in equity for an account with reference to transactions which were all more than six years old. In order to take the case out of the statute the plaintiff relied upon a letter from the defendant, which was in answer to a request from the plaintiff to settle the account by paying the balance due, and in which the defendant promised to go into the account, but intimated that the balance might probably be the other way. This letter was held to be an answer to the statute by Wood, V.-C., who said:—"It is not necessary for the purpose of a suit for an account to have an acknowledgment that a debt is actually due; but it is enough that there is an acknowledgment that an account is pending, and that the defendant promises to pay the balance (if any) due from him upon such account; because it may be that the precise result of the account, and on which side the balance will be, cannot be known beforehand" (3).

Admission
of account
pending.

If, however, a definite sum smaller than the sum claimed is named in the acknowledgment, only the sum named, it seems, is taken out of the statute (4).

Acknow-
ledgment
of smaller
sum.

If there is no date on the written acknowledgment, it may, it seems, be supplied by parol evidence. This, in one report of *Edmunds v. Downes* (5), is given as a direct decision, but in another report (6) of the same case it appears to have been left in doubt, although, even according to that report, the inclination of Bayley, B., was in favour of that view. And it is submitted that the

Parol
evidence of
acknow-
ledgment.

(1) *Archer v. Leonard*, 15 Ir. Ch. R. 267. See *Curwen v. Milburn*, 42 Ch. D. 424.

(2) *Kay*, 678.

(3) See *Firth v. Slingsby*, 58 L. T. 481.

(4) *Dabbs v. Humphries*, 10 Bing. 446.

(5) 2 C. & M. 463.

(6) 4 Tyr. 179.

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—Limited
acknow-
ledgment.

name of the creditor, if not mentioned in the acknowledgment, may be supplied in the same way (1). If it is not clear from the acknowledgment itself to what debt it refers, this also may be proved by parol (2), and, if the acknowledgment is lost, parol evidence of its contents is admissible (3).

An acknowledgment coupled with an assertion that the debtor has a set-off sufficient to countervail the debt is not sufficient to take the debt out of the statute (4). So if the acknowledgment points to payment only in a particular manner, or out of a particular fund, it cannot amount to a promise to pay in any other manner (5). Thus a submission to arbitration, containing a promise to pay whatever should be found due at such times and in such proportions as the arbitrators should appoint, is not available as an acknowledgment if the arbitration prove abortive, unless the submission contains an unqualified acknowledgment of the debt (6). If the acknowledgment be only part of a general arrangement of accounts between the parties, an unconditional promise to pay will not be inferred (7). Where there are other expressions which alone would be held to amount to an absolute promise, a particular mode of payment may possibly be so mentioned as merely to suggest a convenient arrangement, and not to qualify the promise (8).

(1) See *Hartley v. Wharton*, 11 A. & E. 934.

(2) *Spickernell v. Hotham*, Kay, 669; *Bewley v. Power*, Hayes & Jones, 368.

(3) *Haydon v. Williams*, 7 Bing. 163.

(4) *In re River Steamer Co. Mitchell's Claim*, L. R. 6 Ch. 829.

(5) *Whippy v. Hillary*, 3 B. & Ad. 399; *Routledge v. Ramsay*, 8 A. & E. 221; *Cawley v. Furnell*, 20 L. J. C. P. 197; *Courtenay v. Williams*, 3 Hare, 550; *In re Littles*, 10 Ir. Eq. R. 275; *Buckmaster v. Russell*, 10 C. B. N. S. 745; *Philips v. Philips*, 3 Hare, 281.

(6) *Hales v. Stevenson*, 9 Jur. N. S. 300; 7 L. T. N. S. 317; 8 L. T. N. S. 798.

(7) *Cripps v. Davis*, 12 M. & W. 159; *Goate v. Goate*, 1 H. & N. 29; *Francis v. Hawkesley*, 1 E. & E. 1052; 28 L. J. Q. B. 370.

(8) *Gardner v. McMahon*, 3 Q. B. 561; *Evans v. Simon*, 9 Exch. 282.

If the acknowledgment be contained in a letter written "without prejudice," no unconditional promise to pay can be inferred (1).

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Letter
written
"without
prejudice."
Admission
in bank-
ruptcy.

Questions have arisen as to how far admissions of debts by a bankrupt in the course of bankruptcy proceedings are sufficient to take the debts out of the statute. It may be said that such admissions can in no case whatever operate as acknowledgments, for two reasons:—First, because they are not made to the creditor, but to third parties; and secondly, because not being voluntary, but exacted from the debtor in the course of the proceedings, they cannot imply a promise to pay. As to the first of these arguments, it might be contended that the admission, if not made to the creditor, is made to the Court, or the trustee, or the official receiver on the creditor's behalf; as to the second, although it seems to have considerable weight, yet at all events in the case of a petition by the debtor for his own bankruptcy it may be contended that, as the whole proceedings are set on foot by the debtor, any acknowledgment made in carrying them out ought to be considered voluntary. But it seems that such an admission cannot amount to more than a promise to pay under the provisions of the Bankruptcy Acts; and for this reason, if for no other, the admission must be insufficient as an acknowledgment in an action (2). And the same principle holds good with regard to an admission of a debt in the schedule to a composition or inspectorship deed, though verified by the affidavit of the debtor (3). There was a decision at Nisi Prius to the contrary effect (4), but this was distinctly overruled in *Everett v. Robertson* (5), the judgments in

(1) *Cory v. Bretton*, 4 C. & P. 462. *In re River Steamer Co. Mitchell's Claim*, L. R. 6 Ch. 822.

(2) *Courtenay v. Williams*, 3 Hare, 550; *Everett v. Robertson*, 28 L. J. Q. B. 23.

(3) *Ex parte Topping*, 34 L. J. Bk. 44; 4 De G. J. & S. 551.

(4) *Eicke v. Nokes*, 1 M. & R. 359.

(5) 28 L. J. Q. B. 23.

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which, though given as to a schedule filed under the repealed Act 7 and 8 Vict. c. 70, are yet clearly applicable to every case of bankruptcy. But as the statute may be set up in bankruptcy against debts barred at the time of adjudication (1), the question might be raised whether it is competent for the creditor to use admissions made in the course of bankruptcy proceedings as acknowledgments to prevent the statute being set up in these proceedings themselves. It seems clear, however, that such admissions cannot be so made use of (2).

An acknowledgment by a person on the eve of a bankruptcy, if fraudulently made in order that a debt which has been treated by creditor and debtor as extinguished may be revived, so that the creditor may get a dividend in the bankruptcy, would probably be inoperative to revive the debt, at all events for the purposes of the bankruptcy (3).

Acknowledgment
by an
infant.

As an infant is capable of contracting a debt for necessities, he is also capable of acknowledging the debt, and so taking it out of the statute (4).

9 G. IV.
c. 14, s. 8.

By the 8th section of Lord Tenterden's Act, 9 Geo. IV. c. 14, it is enacted as follows:—

“No memorandum or other writing made necessary by this Act shall be deemed to be an agreement within the meaning of any statute relating to the duties of stamps” (5).

Unstamped
promissory
note.

This exception refers only to the stamping of instruments as agreements, and therefore does not remove the necessity for any stamp, other than an agreement stamp, which a document put forward as an acknowledgment is

(1) See *ante*, p. 19.

(2) *Smallcombe v. Bruges*, McClelland, 45; *Pott v. Clegg*, 16 M. & W. 321; *In re Clendinning*, 9 Ir. Ch. R. 284. See *Ex parte Revell*. *In re Tollemache*, 13 Q. B. D. 720.

(3) See *In re Lane*. *Ex parte Gaze*, 23 Q. B. D. 74.

(4) *Willins v. Smith*, 4 E. & B. 180; S. C. *sub nom.* *Williams v. Smith*, 24 L. J. Q. B. 62.

(5) See *Morris v. Dixon*, 4 A. & E. 845; 6 N. & M. 438; *Taylor v. Steele*, 16 M. & W. 665.

from its form required to bear. Therefore, a bill of exchange or promissory note not properly stamped cannot be put in evidence as an acknowledgment or as forming part of an acknowledgment in conjunction with another writing referring to it (1). There is some difficulty in the question whether an instrument in the form of a receipt without a stamp can be put in evidence as an acknowledgment. But the law on the subject may be thus briefly stated; such an instrument cannot be put in evidence to prove the payment of the money mentioned therein as received, or any fact to be inferred from such payment. But it may be used to prove any other fact which is supported by the document, and which is independent of the question whether the payment was made or not (2).

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An advertisement to creditors to bring in their claims has no operation as an acknowledgment (3).

Public
adver-
tisement.

The latter part of the 1st section of 9 Geo. IV. c. 14, is as follows:—

9 G. IV.
c. 14, s. 1.

“Where there shall be two or more joint contractors, or executors, or administrators of any contractor, no such joint contractor, executor or administrator shall lose the benefit of the said enactments or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them; provided always that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever: provided also, that in actions to be commenced against two or more such joint contractors or executors or administrators, if it shall appear

Acknow-
ledgment
by one
joint con-
tractor.

(1) *Jones v. Ryder*, 4 M. & W. 32; *Foster v. Dawber*, 6 Exch. 839; *Parmiter v. Parmiter*, 1 J. & H. 135; 3 De G. F. & J. 461; *Evans v. Prothero*, 2 Mc. & G. 319, and 1 De G. M. & G. 572; *Holmes v. Mackrell*, 3 C. B. N. S. 789.

(2) *Matheson v. Ross*, 2 H. L. 286.

(3) *Scott v. Jones*, 4 C. & F. 382, overruling *Andrews v. Brown*, Prec. Ch. 385. *In re Stephens*. *Warburton v. Stephens*, 43 Ch. D. 39.

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at the trial or otherwise that the plaintiff though barred by either of the said recited Acts or this Act as to one or more of such joint contractors or executors or administrators shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

By partner. As an acknowledgment by an agent binds the principal, and as one of several partners may fairly be considered the agent of the others, so as to be able to bind the firm by acknowledging a partnership debt (1), acknowledgments made by a partner must be distinguished from acknowledgments made by one of several ordinary joint contractors.

Statement
of accounts.

It seems to have been considered in *Smith v. Forty* (2) that when a debtor and creditor went through an account together and settled the amount, although the items were on one side only, and the amount as settled was not signed so as to constitute a valid acknowledgment, yet an action would lie for the amount so settled on an account stated. Parke, B., in *Jones v. Ryder* (3), seems to have thought this view untenable, except on the ground that in the case in question there was an agreement that interest should run from the date of the settlement. And Alderson, B., in *Ashby v. James* (4), disapproves altogether of *Smith v. Forty*. In *Clark v. Alexander* (5), it was laid down by Tindal, C.J., that a statement of accounts, if inoperative as an acknowledgment, will not be allowed to support an action on an

(1) *Braithwaite v. Britain*, 1 Keen, 221; and see next chapter.

(2) 4 C. & P. 126; and see *Ashby v. Ashby*, 3 M. & P. 186; *Catling v. Skoulding*, 6 T. R. 189.

(3) 4 M. & W. 32.

(4) 11 M. & W. 542. See *Brenan v. Crawley*, 16 W. R. 754.

(5) 8 Scott, N. R. 147.

account stated, as, if it were, it would be an obvious evasion of Lord Tenterden's Act. The combined operation of these cases, it is submitted, is to overrule *Smith v. Forty*. Where there are items on both sides and a balance is struck, the case is different and resolves itself into one of part payment and will be discussed below (1).

In conclusion, although from the acknowledgment of a statute-barred debt the law implies a new promise to pay, and thus the remedy is revived, no such effect can be given where the cause of action arises from the doing or omitting to do some act in breach of contract (2) or some act which gives rise to an action of tort (3). Where upon such a breach of contract there is no need to assess the damages, but a definite sum can be recovered as liquidated damages by virtue of stipulation between the parties, the following distinction seems to arise:—that a mere acknowledgment of the breach can have no effect, but an acknowledgment of the stipulated sum being due takes the case out of the statute. Where, before the Judicature Act, 1873, a plaintiff filed a bill in equity for an account in circumstances in which he might have proceeded at law by an action either of assumpsit or trover and alleged in his bill that an account had been rendered by the defendant, which account was sufficient to take the debt out of the statute, if the plaintiff had sued in assumpsit, but could have no such effect, if the plaintiff had sued in trover, Leach, V.-C., overruled a plea of the statute, the rendering of the account not being denied, and treated the bill as analogous to an action of assumpsit (4).

As an acknowledgment or part payment operates to take a debt out of the statute by renewing the promise to

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Acknowledgment of liability other than debt.

Effect of disability at the time of making an acknowledgment.

(1) See *post*, Ch. V.

(2) *Per* Lord Ellenborough, *Boydell v. Drummond*, 2 Campb. 160. See *Whitehead v. Howard*, 2 B. & B. 372.

(3) *Hurst v. Parker*, 1 B. & Ald. 92; *Short v. McCarthy*, 3 B. & Ald. 626; *Gibbons v. McCasland*, 1 B. & Ald. 690.

(4) *Hony v. Hony*, 1 S. & St. 568.

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pay or conferring a new cause of action, it would seem that if the creditor is under disability or the debtor beyond seas at the time an acknowledgment or part payment is made, time would not run till the disability has ceased or the debtor has returned within seas; and this appears in one case to have been assumed without argument (1).

(1) *Flood v. Patterson*, 29 Beav. 295; 30 L. J. Ch. 486.

CHAPTER V.

PART PAYMENT AND PAYMENT OF INTEREST.

It was held soon after the passing of the statute that its effect might be avoided not only by an acknowledgment in words, but by part payment of principal, or by payment of interest; and the effect of such payments is saved from the operation of the provisions of the statute of 9 Geo. IV. c. 14, respecting acknowledgments in writing (1).

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Part pay-
ment of
principal
or payment
of interest.

The principle of this doctrine is that any such payment is an acknowledgment of the existence of the debt, and from it the law raises an implication of a promise to pay the residue or the principal as the case may be, just as it does from a simple acknowledgment in writing (2). An attempt seems to have been made in two cases (3) to deny the application of this principle to payments of interest, but the attempt was unsuccessful; and in *Bamfield v. Tupper* (4) it was held that payment within the six years of interest on a note which did not carry interest on the face of it, and on which no demand was proved to have been made, took the debt out of the statute. This case proves that the payment of interest

(1) *Fordham v. Wallis*, 10 Hare, 225; 22 L. J. Ch. 548.

(2) *Morgan v. Rowlands*, L. R. 7 Q. B. 493; *Green v. Humphreys*, 26 Ch. D. 474.

(3) *Bealy v. Greenslade*, 2 C. & J. 61; *Purdon v. Purdon*, 10 M. & W. 562.

(4) 7 Exch. 27; S. C. *sub nom. Bradfield v. Tupper*, 21 L. J. Exch. 6. See *In re Rutherford. Brown v. Rutherford*, 14 Ch. D. at p. 692.

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on a debt, even though the debt does not properly carry interest, will be a good payment to avoid the statute. But, on the other hand, it is said that payment of principal is no evidence of a promise to pay interest. The case usually cited in support of this proposition is *Collyer v. Willock* (1); but in that case it was not decided that the debt bore interest, and the whole of the principal was tendered and afterwards paid into court, the defendants denying at the time of the tender that any interest was due. The effect of payment into court as a part payment was not questioned, and the case is in fact governed by the principle stated below, that a payment unless made as part payment of a greater debt does not take the greater debt out of the statute. It is submitted, however, that if a debt properly carries interest, the principal and interest constitute one demand, and therefore payment of the principal or of part of it takes the interest also out of the statute.

Circumstances must support implied promise.

If there are any circumstances attending the payment which rebut the implication of the promise, as, for instance, a refusal to pay the remainder of the debt, no effect can be given to the payment so as to take the case out of the statute (2). It follows from this that the payment must be shown to be made, first, on account of some debt; secondly, on account of the debt sued for; and thirdly, as part only of what is due (3). It is for the jury to decide these questions on consideration of the whole of the circumstances given in evidence. Express declarations of the debtor at the time of the payment relied on are of course conclusive, but assertions made by him subsequently to the payment are merely

(1) 4 Bing. 313.

(2) *Wainman v. Kynman*, 1 Exch. 118; *Davies v. Edwards*, 7 Exch. 22; 21 L. J. Exch. 4; and see *Foster v. Dawber*, 6 Exch. 839, 853; 20 L. J. Exch. 385, 392.

(3) *Tippetts v. Heane*, 1 C. M. & R. 252; 4 Tyr. 772; *Holme v. Green*, 1 Stark. 488. See *Burkitt v. Blanshard*, 3 Exch. 89; *Linsell v. Bonsor*, 2 Bing. N. C. 241.

evidence to which the jury may give what weight they think proper (1), and they will also be justified in inferring the nature of a payment relied on from the nature of similar payments made by the debtors at other times (2). The plaintiff must in all cases give some evidence that the payment relied on was made on account of some debt; but the circumstances attending the payment, even without any direct evidence, may be such as to render it a proper question for the jury whether such payment could be made for any other purpose (3). When it is once established that the payment was made on account of a debt, and no other debt is shown to have existed between the plaintiff and the defendant at the time the payment was made, a jury will be justified in pronouncing that the payment was made in respect of the debt sued for (4). If more debts than one are due, and a payment is made which is not specifically appropriated, it is a question of fact in respect of which debt the payment was made (5). If the debt sued for is a debt definite and ascertained as on a promissory note, and a payment smaller than the amount of the debt is proved to have been made in respect of it, it necessarily follows that the payment must have been made as part payment, so that the requisites to raise the implied promise to pay will have been fulfilled; but if, on the contrary, the amount of the debt is unascertained, as upon a running account, or for work and labour, it by no means follows (even assuming the payment to have been made in respect of the debt sued for) that the payment was made as part payment, for it might have been intended by the defendant as in full discharge of all he admitted to be due. In such a case, therefore, there

(1) *Baildon v. Walton*, 1 Exch. 617, 633.

(2) *Worthington v. Grimsditch*, 7 Q. B. 479.

(3) *Burn v. Boulton*, 2 C. B. 476.

(4) *Evans v. Davies*, 4 A. & E. 840. See *Tippett v. Heane*, 1 C. M. & R. 252; S. C. 4 Tyr. 772.

(5) *In re Rainforth. Gwynn v. Gwynn*, 49 L. J. Ch. 5.

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must be evidence that the payment was not intended as in full discharge (1). Hence in the case of a breach of contract for which by the terms of the contract a stipulated sum is to be paid as liquidated damages, the payment of a smaller sum on account of the breach would not keep alive the right to recover the remainder of the stipulated sum without evidence to show that it was intended at the time to be a part payment.

Payment
into court.

Payment into court can in no case keep the debt alive; it is equivalent to saying that so much is due and no more (2). Apart from this reason, payment into court would now be ineffectual, for the same reason that an acknowledgment after action brought is (3).

Payment
on the eve
of bank-
ruptcy.

A payment on account of a debt made on the eve of the bankruptcy of the debtor is a good payment so as to revive the debt, if such debt has up to that time been treated by the parties as a subsisting debt; but a payment at such a time on account of a debt, which has been treated as dead and gone, if made fraudulently with the object of giving the creditor a share of the debtor's estate in the bankruptcy, would not avail so as to revive the debt as against the other creditors (4).

Payment
of interest.

With respect to payment of interest, if the payment is shown to have been made as interest, the only question that can in general arise is in respect of what debt it was made. If more than one debt is shown to have been due at the time of the payment either of principal or interest relied on, a question arises whether such payment was made on account of all the debts or was appropriated to any one or more, and if so, to which of them (5). This appropriation need not be proved by any express declara-

(1) *Burn v. Boulton*, 2 C. B. 481, *per* Maule, J.; *Waugh v. Cope*, 6 M. & W. 824.

(2) *Long v. Greville*, 3 B. & C. 10; *Reid v. Dickons*, 5 B. & Ad. 499; 2 N. & M. 369.

(3) See p. 95.

(4) *In re Lane. Ex parte Gaze*, 23 Q. B. D. p. 77, *per* Cave, J.

(5) *Wycombe Union v. Eton Union*, 1 H. & N. 687.

tion of the debtor at the time of payment, but any expressions used by him either before or after that time, or any other circumstances from which it may be inferred that the payment was intended to be appropriated to any particular debt or debts, or was made on account of all the debts collectively, will be sufficient for this purpose (1). If the evidence shows that the payment is made on account of all, it will prevent any of the debts being barred by statute. In the absence of any evidence that the payment is made on account of all the debts or on account of the particular debt or debts, the jury, it seems, would not be justified in inferring that the payment was made on account either of the particular debt or debts or on account of all (2).

If at the time the payment was made some of the debts were barred and some not, such payment can, in the absence of any other evidence, be attributed only to those debts which were not barred (3). In *Nash v. Hodgson* the question was whether a note dated in 1841 was taken out of the statute by a payment of interest in 1846. It was shown that at that time two other notes were also due, both more than six years old. It appeared that the payment had not been appropriated by the debtor in any way, but that the creditor had, without the debtor's knowledge or subsequent sanction, appropriated the payment to the note of 1841. Wood, V.-C., when the case was before him (4), held that such an appropriation by the creditor had no effect at all with respect to the Statute of Limitations, and that the payment therefore was to be attributed as much to one note as the other, and therefore would not be held as an acknowledg-

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Presump-
tion that
payment is
for debts
unbarred.

(1) *Waters v. Tompkins*, 2 C. M. & R. 723, 726; *Walker v. Butler*, 6 E. & B. 506; *Bevan v. Gething*, 3 Q. B. 740; *Dixon v. Holdroyd*, 7 E. & B. 903.

(2) *Burn v. Boulton*, 2 C. B. 485, per Tindal, C.J.

(3) *Mills v. Fowkes*, 5 Bing. N. C. 455; 7 Scott, 444; *Nash v. Hodgson*, on appeal, 6 De G. M. & G. 474; 25 L. J. Ch. 186.

(4) *Kay*, 650; 23 L. J. Ch. 780.

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ment of either. He seems to have considered that the case of *Mills v. Fowkes* (1) precluded his deciding otherwise. In that case, however, no question arose as to the later debt, which was not six years old even at the time of action brought, and the point decided was that the payment could not, without specific appropriation, be attributed to the debt that was barred. Cranworth, L.C., and Turner, L.J. (2), reversed the judgment of Wood, V.-C., on the ground that the payment could not have been specifically made on account of the debts that were barred, and must therefore have been made on account of the note of 1841, or on account of all the notes, and therefore must at all events have taken the note of 1841 out of the statute. Knight Bruce, L.J., concurred, but on the ground that the creditor, in appropriating the payment to the note of 1841, acted as the agent of the debtor. He considered the appropriation of a payment which a creditor has a right to make where none is made by a debtor, to be such an appropriation as to have an effect on the operation of the statute. This view is, however, against the weight of judicial authority, and is expressly dissented from in the very same case on grounds which would seem conclusive—namely, that the implied promise which the law raises to pay a debt barred by statute cannot be made without an intention on the part of the debtor to make it, and that such an intention ought not to be inferred from an act done by the creditor in pursuance of the power which the law gives him to appropriate a payment not appropriated by the debtor. With respect to the suggestion of Cranworth, L.C., and Turner, L.J., that the payment might be treated as on account of all the debts so as to keep all alive, this is contrary to *Mills v. Fowkes*, for on such a view the debt as to which the question on the statute arose in *Mills v.*

(1) 5 Bing. N. C. 455; 7 Scott, 444.

(2) 6 De G. M. & G. 474; 25 L. J. Ch. 186.

Fowkes would have been taken out of the statute. In an action upon a promissory note payable on demand with interest brought more than six years after the date of the note, it was proved that the plaintiff had within six years sued and recovered judgment for interest upon the note, and that the defendants who had defended the action paid the amount of interest under the judgment. It was held that the payment of interest under the judgment was not such a payment that a promise to pay the principal could be inferred from it (1).

In *Dowling v. Ford* (2) the plaintiff's testator, being asked to advance £300 to the principal debtor on mortgage at £5 per cent. interest, refused to do so without the additional security of a note for £50, to be given him by the principal debtor and the defendant as his surety; £7 10s. was regularly paid every half year by way of interest, and this was relied on as taking the note out of the statute; it was argued that the payment was on account of the mortgage debt, and not of the note; it was, however, held that the note was taken out of the statute; some of the judges held, it seems, that the whole was one transaction, others that the note was a collateral security for part of the same debt. *Brandram v. Wharton* (3) may seem inconsistent with this; but that case seems to have been decided on other grounds, and, in so far as it is inconsistent with the case last quoted, must be considered overruled. It is believed that there are no other cases on this point, but it is submitted that, where there is one debt, and one or more securities for it, it being once clearly shown that the subject-matter is the same, a payment of interest on the whole sum will take the debt and all the securities out of the statute.

Payment
on one of
two col-
lateral
securities.

| The effect of part payment and payment of interest

Payment
by agent.

(1) *Morgan v. Rowlands*, L. R. 7 Q. B. 493.

(2) 11 M. & W. 329.

(3) 1 B. & Ald. 463.

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being unaffected by Lord Tenterden's Act, it has never been questioned that payment by an agent has the same effect as payment by the principal. It is a question for the jury whether the person making the payment was an agent for that purpose (1).

Where
agency is
inferred.

In *Jones v. Hughes* (2) a sum raised by the direction of a parish vestry was secured by a note signed by the four persons then churchwardens and overseers, they being described as such, with the addition of the words, "or others for the time being," and interest on the note was from time to time paid out of the parish moneys; the action was brought against two of those who had signed the note. It was held that the form of the note was evidence to go to the jury that the makers of it constituted the churchwardens and the overseers for the time being their agents for the purpose of paying the interest, although they had never expressly authorised them to make the payments relied on.

In a case where the payee of a promissory note had endorsed it over to the plaintiffs for the purpose of raising money to be paid to the defendant, the maker of the note, and interest had been paid to the plaintiffs by the payee, it seems to have been considered that the payee was not the agent of the defendant for the purpose of paying interest, so as to keep the debt alive against the defendant (3).

Payment
to an agent.

The payment need not be made to the plaintiff in person, but it is sufficient if it is made to his agent (4), or by agreement between the parties to any person on the plaintiff's account. Such agreement may be proved by implication or course of dealing or subsequent ratification, as well as by express and previous direction,

(1) *Rew v. Pettet*, 1 A. & E. 196; S. C. 3 N. & M. 456, sub nom. *Crew v. Petit*; *Jones v. Hughes*, 5 Exch. 104. See *Newbould v. Smith*, 29 Ch. D. 882.

(2) 5 Exch. 104.

(3) *Harding v. Edgecumbe*, 28 L. J. Exch. 313.

(4) *Evans v. Davies*, 4 A. & E. 840.

and it is for the jury to say whether such agreement existed (1). But where the maker of a promissory note which was indorsed over without his knowledge by the payee to the plaintiffs continued after the note was indorsed over to make part payments of principal and payments of interest to the payee, only one of which payments was communicated to the plaintiffs, and the whole debt was thus eventually paid to the payee, it was held that, even if the plaintiffs could adopt the payee as their agent for receiving one instalment, they could not repudiate the subsequent payments by which the note was discharged, and could not select the one payment which had been communicated to them as a part payment taking the debt out of the statute (2).

Payment to a husband of interest upon a note made to his wife *dum sola*, although it did not operate as a reduction into possession by the husband, was before the Married Women's Property Act, 1882 (3), a good payment to take the note out of the statute, because made to the husband on behalf of and as agent for his wife (4). And the law is the same now, it seems, in spite of the Married Women's Property Act, 1882.

Payment to
a husband.

A *cestui que trust* is considered to be the agent of the trustee for the purpose of receiving payment (5). Where trust money is lent to the person who is entitled to receive the interest on the fund, he must be treated as having paid himself, so as to prevent the time running while he is so entitled (6). Wood, V.-C., in *Spickernell v.*

Trustee
and *cestui*
que trust.

(1) *Worthington v. Grimsditch*, 7 Q. B. 479; *Edwards v. Janes*, 1 K. & J. 534.

(2) *Stamford, Spalding and Boston Banking Co. v. Smith*, L. R. (1892) 1 Q. B. at p. 770.

(3) 45 & 46 Vict. c. 75.

(4) *Hart v. Stephens*, 6 Q. B. 937.

(5) *Meggison v. Harper*, 2 C. & M. 322. See *Gleadow v. Atkin*, 1 C. & M. 410.

(6) See *Burrell v. Lord Egremont*, 7 Beav. 205; *Mills v. Borthwick*, 35 L. J. Ch. 31; *Topham v. Booth*, 35 Ch. D. 607. *In re Keays's Estate*, 3 Ir. R. Eq. 659.

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Hotham (1), decided that, where a settlor covenanted to transfer a sum of stock into the names of the trustees of a settlement under which he took the first life interest, but the stock was not transferred, such implication could not arise so as to prevent time from running in favour of settlor, because the trust fund never having had any existence as such, he could not be supposed to have received the interest. And the same reasoning would apply where the settlor had contracted, whether by specialty or simple contract, to pay a sum of money and had not paid it (2).

The part payment must be made either to the creditor or his agent. Where the maker of a promissory note, after it had been transferred by indorsement, made a part payment to the original holder in ignorance of the indorsement over, it was held, in an action by the indorsees, that such a part payment could be of no avail to take the debt out of the statute (3). It is now quite settled that part payment to a stranger is of no effect (4).

Payment to
one acting
as administrator.

In *Clark v. Hooper* (5), where a note had been made to an intestate and interest had been paid to a person who was acting as, and was supposed to be, but was not, in fact, the administrator, the decision that the payment took the debt out of the statute went on the ground that it was an acknowledgment to a third person. The decision cannot now be supported on that ground, but may be supported on other grounds, namely, that where a payment is made to a person who is believed by the person paying to be in a representative capacity, the payment may enure to the benefit of the estate which the debtor supposed to be represented by the

(1) Kay, 673.

(2) See *Stone v. Stone*, L. R. 5 Ch. 74.

(3) *Stamford, Spalding and Boston Banking Co. v. Smith*, L. R. (1892) 1 Q. B. 765.

(4) *Ib.*

(5) 10 Bing. 480; 4 Moore & S. 353.

person to whom the payment was made (1). Of course, if a person so believed to be an administrator afterwards takes out letters of administration, the effect of the part payment will enure to the benefit of the estate on another ground, namely, that the administration relates back to the death of the intestate, so that the payment raises a promise to the administrator (2).

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It is not necessary that the payment should be actually made in money, but any agreement between the parties which is by mutual agreement intended to have the effect of *pro tanto* discharging the party indebted, will be held to have the same effect as actual payment of money. The existence of such an agreement is a question for the jury, and may, it is submitted, be proved by implication or course of dealing or subsequent ratification, as well as by express agreement (3). For example, the delivery of goods to a creditor (4) or his agent (5), or the maintenance of the child of the creditor (which was, in fact, supplying goods to the child on behalf of the father (6)) have been held sufficient. The receipt by a mortgagee of the rents and profits of the mortgaged property is not equivalent to the payment of interest or part payment of principal so as to take the mortgage debt out of the statute, for such a receipt is not a payment by the person liable to the debt or by some one on his behalf (7). Where there are debts due on both sides,

Payment
need not be
in money.

(1) *Stamford, Spalding and Boston Banking Co. v. Smith*, L. R. (1892) 1 Q. B. 769, 771.

(2) *Bodger v. Arch*, 10 Exch. 333. See chapter on Pleading, Part VIII. Ch. I.

(3) See *Worthington v. Grimsditch*, 7 Q. B. 479.

(4) *Moore v. Strong*, 1 Bing. N. C. 441; *Hooper v. Stephens*, 4 A. & E. 71; *Hart v. Nash*, 2 C. M. & R. 337; *Collinson v. Margesson*, 27 L. J. Exch. 305.

(5) *Pearce v. Selby*, 6 Jur. 896.

(6) *Bodger v. Arch*, 10 Exch. 333; and see *Doe v. Lightfoot*, 8 M. & W. 560; *Amos v. Smith*, 31 L. J. Exch. 423.

(7) *Cockburn v. Edwards*, 18 Ch. D. 449, overruling the dictum of Shadwell, V.C., in *Brocklehurst v. Jessop*, 7 Sim. 438; *Harlock v. Ashberry*, 19 Ch. D. 539.

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and the accounts are gone through by the parties and a balance struck, this in effect constitutes a payment on either side to the amount of the smaller debt (1). But it is the striking of the balance that constitutes the payment, and not the mere existence or even statement in writing of cross demands (2).

In *Stewart v. Connick* (3) a trustee in 1861 rendered to his *cestui que trust* an account which showed that the *cestui que trust* owed the trustee £191, and, on the *cestui que trust* applying for money, the trustee refused to make further advances until the *cestui que trust* had reduced the balance due by him. The trustee remained in possession of the trust property and furnished no further accounts, and made no other payment to the *cestui que trust* till September, 1863, when he gave the *cestui que trust* a small sum, and afterwards gave him various other sums. The trustee died in 1869, and after his death his widow, who was his personal representative, applied the receipts of the trust property in reduction of the debt of the *cestui que trust*, and in May, 1870, brought an action against the *cestui que trust* for the balance owing. The defendant having pleaded the statute, it was held that the above-mentioned facts were evidence from which it might be inferred that there was an authority given by the defendant to the plaintiff's husband to apply the defendant's income in liquidation of the balance due on the account of 1861, and that it was to be presumed that the payments made after 1863 were payments by the trustee of his own money, and therefore that the balance due in 1861 had been taken out of the statute by part payment.

The decision of the Court of Exchequer in *Maber v.*

(1) *Ashby v. James*, 11 M. & W. 542.

(2) *Williams v. Griffiths*, 2 C. M. & R. 45; *Cottam v. Partridge*, 4 M. & G. 271; S. C. 4 Scott N. R. 819; *Clark v. Alexander*, 8 Scott N. R. 147; and see *Pott v. Clegg*, 16 M. & W. 327; 2 Wms. Saund. 185.

(3) 5 Ir. R. C. L. 562.

Maber (1) seems to have gone further than any of the cases above referred to in putting a transaction where no money passes on the same footing as actual payment. There the plaintiff, who sought to recover from an executrix a sum of money which had been lent to the testator more than six years before action brought, relied on the following transaction as taking the debt out of the statute. An interview took place within the six years between the plaintiff and the testator and the testator's wife, at which the amount of interest due on the loan was agreed between the parties, and the testator offered to pay the amount; but the plaintiff stopped him, and said to the testator's wife: "I will make you a present of it." The plaintiff then wrote a receipt which he gave to the wife, telling her to take care of it. The majority of the Court held this a sufficient part payment to take the case out of the statute; Bramwell, B., dissented on the ground that the transaction was not such as to alter the liabilities of the parties. Whatever may be the right view of the facts of this particular case, there seems no doubt what is the correct test in deciding whether any transaction can be considered equivalent to payment, for the purpose of taking a case out of the operation of the statute. All the judges seemed to have agreed that a transaction in order to be sufficient for that purpose must be such as would have supported a plea of payment, if the debtor had been subsequently sued for the sum alleged to be paid.

The acceptance by the debtor of a bill drawn upon him by a creditor or the delivery to the creditor of a bill drawn by the debtor on a third person, on account of part of the debt, is a sufficient part payment to take the debt out of the statute, whether the bill is paid at maturity or not; but even if it be paid, the promise implied from the part payment is made at the time of the delivery of the

Giving a
bill or
note.

(1) L. R. 2 Exch. 153; 36 L. J. Exch. 70.

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ment, how
proved.

bill, and not when it is paid. (1) And the effect of giving a promissory note would be the same.

It was formerly held, though several judges from time to time threw doubts on the correctness of such a doctrine (2), that the effect of Lord Tenterden's Act was to prevent any admission by the debtor of part payment or payment of interest by him being given in evidence, unless such admission were in writing, signed by the debtor. In *Trentham v. Deverill* (3), an account between the plaintiff and defendant, in the handwriting of an agent of the defendant, was admitted in evidence in proof of payment of interest, on the agent admitting the handwriting, although he did not remember the fact of payment. In *Bayley v. Ashton* (4) this was said to be reconcileable with the other cases, on the ground that the witness only used the writing to refresh his memory. This seems, however, to be a mistaken view of the case. But it is now immaterial, as it was laid down by the Exchequer Chamber in *Cleave v. Jones* (5), overruling all the former cases, that part payment or payment of interest, for the purpose of taking a debt out of the statute, may be proved like any other fact. When interest on a debt due from a firm was calculated periodically in the books of the firm, and carried to the capital account, it was attempted to be argued, on the authority of *Cleave v. Jones*, that this was evidence of payment of interest; but it was held that, so far from being evidence of payment, it was evidence that no payment had been made (6).

(1) *Gowan v. Forster*, 3 B. & Ad. 507; *Irving v. Veitch*, 3 M. & W. 90; *Turney v. Dodwell*, 3 E. & B. 136; 23 L. J. Q. B. 137.

(2) *Willis v. Newham*, 3 Y. & J. 518; *Waters v. Tompkins*, 2 C. M. & R. 723; 1 T. & G. 137; *Bayley v. Ashton*, 12 A. & E. 493; 4 Per. & Dav. 204; *Maghee v. O'Neil*, 7 M. & W. 531; and see *Eastwood v. Saville*, 9 M. & W. 615; *Bevan v. Gething*, 3 Q. B. 740.

(3) 3 Bing. N. C. 397.

(4) 12 A. & E. 493.

(5) 6 Exch. 573; 20 L. J. Exch. 238. See *Edwards v. Janes*, 1 K. & J. 534.

(6) *Jackson v. Ogg*, Johns. 397.

Before Lord Tenterden's Act (1) an indorsement by the payee on a note or bill, of payment of interest made before the statute had run, was, after the death of the party making it, evidence of such payment, for the purpose of taking the case out of the statute, as being a declaration of a deceased person against his interest; but such indorsements made after the statute had run were inadmissible, because, so far from operating against the interests of the parties by whom they were made, they might have operated directly for their interests (2), as the effect of such indorsements, if admitted in evidence, might have been to create a right to recover both principal and interest, when otherwise neither principal nor interest could have been recovered. By the 3rd section of Lord Tenterden's Act it is provided as follows: "No indorsement or memorandum of any payment written or made after the time appointed for this Act to take effect (3), upon any promissory note, bill of exchange or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of" the statute. "Other writing" here means a writing containing the contract by which the party is to be bound, and, therefore, this section does not prevent the common principle of the laws of evidence with respect to declarations of deceased persons against their interest being applicable to entries of payment made in account books, or in any other way than upon the note or other instrument creating the contract (4). But entries made after the statute has run are not admissible in evidence, for, as stated above, such entries

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Indorsements on notes or bills.

Sect. 3 of Lord Tenterden's Act.

(1) 9 G. IV. c. 14.

(2) *Briggs v. Wilson*, 17 Beav. 330; and, on appeal, 5 De G. M. & G. 12, and cases cited: and see below, Part II. Ch. IV.

(3) I.e. 1st January, 1829, see sect. 10 now repealed; see 36 & 37 Vict. c. 91.

(4) *Bradley v. James*, 13 C. B. 822; 22 L. J. C. P. 193.

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are not then against the interest of the person making them (1).

In *Eastwood v. Saville* (2) the note when produced in evidence by the plaintiff was indorsed with a memorandum of payment, purporting to be signed by the plaintiff, who was a markswoman. It was proved that the memorandum and the plaintiff's name were in the handwriting of the defendant, and there was no proof who made the mark. It was argued that this was sufficient evidence of payment, as being an admission by the defendant; but it was held not to be sufficient on the ground, since settled to be erroneous, that a part payment could only be proved by an admission in writing signed by the debtor. Such an admission, as in the case referred to, would, however, now, since *Cleave v. Jones* (3) be left to the jury, and would probably be considered sufficient, and an indorsed memorandum of payment, signed by the debtor himself, was of course always evidence to go to the jury (4).

Part pay-
ment of
wife's ante-
nuptial
debts.

Before the Married Women's Property Act, 1870 (5), if a woman incurred a debt *dum sola* and married, her husband became liable during the coverture, and could be sued jointly with the wife for the debt. If the wife *dum sola* made a part payment, such payment took the debt out of the statute as against her husband. If after marriage she made a part payment without the authority of her husband, it was clearly ineffectual to take the case out of the statute, because she was incapable of making a new promise (6). If she made the payment by the authority of her husband, she would have been acting as his agent, and the case would have been the same as if

(1) *Newbould v. Smith*, 29 Ch. D. 882.

(2) 9 M. & W. 615.

(3) 6 Exch. 573.

(4) *Purdon v. Purdon*, 10 M. & W. 562.

(5) 33 & 34 Vict. c. 93.

(6) *Pittam v. Foster*, 1 B. & C. 248; *Neve v. Hollands*, 18 Q. B. 262.

the payment had been made by himself. If the payment had been made by the husband, it would also have been ineffectual to support an action against the husband and wife jointly, because the promise implied by the payment being by the husband alone would not have supported the declaration; but it seems that a declaration might have been so framed in an action against the husband alone as to enable the payment to have been taken advantage of (1).

By sect. 12 of the Married Women's Property Act, 1870(2), it was enacted that no husband should by reason of any marriage which should take place after the Act came into operation (9th August, 1870), be liable for the antenuptial debts of his wife, but that the wife should be liable to be sued for, and any property belonging to her for her separate use should be liable to satisfy such debts as if she had remained unmarried. This section is still in force in the case of persons married between the 9th August, 1870, and the 30th July, 1874.

By the Married Women's Property Act, 1874 (3), sect. 1, it is enacted that "So much of the Married Women's Property Act, 1870, as enacts that a husband shall not be liable for the debts of his wife contracted before marriage is repealed, so far as respects marriages which shall take place after the passing of this Act, and a husband and wife married after the passing of this Act may be jointly sued for any such debt." By sect. 2 it is enacted that the husband should only be liable to the extent of certain specified assets (4). This Act, together with the Married Women's Property Act, 1870 (2), was repealed by the Married Women's Property Act, 1882 (5), subject to a proviso that such repeal

- (1) See below, chapter on Pleading, Part VIII. Ch. I.
- (2) 33 & 34 Vict. c. 93.
- (3) 37 & 38 Vict. c. 50.
- (4) See s. 5.
- (5) 45 & 46 Vict. c. 75, s. 22.

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should not affect any act done or right acquired while either of the Acts of 1870 and 1874 was in force, or any right or liability of any husband or wife married before the 1st January, 1883. By sect. 14 of the Married Women's Property Act, 1882, a husband married after the 1st January, 1883, is only liable for the ante-nuptial debts of his wife to the extent of property belonging to his wife which he shall have acquired or become entitled to from or through his wife. By sect. 15 the husband and wife may be sued jointly in respect of such ante-nuptial debts, but either the husband (1) or the wife (2) may be sued separately. By sect. 1, subsect. 2, of the same Act, a married woman is enabled to bind herself by contract in respect of her separate property. The effect of this provision is that a married woman may by a part payment keep alive her ante-nuptial liabilities in respect of her separate estate (3). Such a payment by her could not affect the liability of her husband (4), unless made by her as his agent, in which case it would have no effect on her separate estate. A payment by the husband in respect of an ante-nuptial debt of his wife's could have no effect as regards her separate estate unless made with her authority. If made with her authority, unless the husband also makes the payment on his own account, the effect of it would be limited to the wife's separate estate, and it would not bind the husband personally, but would bind the husband in the event of his becoming entitled to the wife's personal estate after her death. And by virtue of sect. 14 it would seem that now, in cases of marriage after 1st January, 1883, a husband may be sued for an ante-nuptial debt of his wife's even after the wife's death, and that, if she revives the debt during coverture, such a revival would bind him in the event of

(1) See ss. 14 & 15.

(2) See s. 13.

(3) *Beck v. Pierce*, 23 Q. R. D. 322.(4) *Beck v. Pierce*, *ubi supra*.

the wife's separate estate becoming his. As to marriages that took place before the 1st January, 1883, sect. 14 of the Married Women's Property Act, 1882, contains a proviso that nothing in the Act is to increase or diminish the liability of any husband married before the commencement of the Act in respect of an ante-nuptial debt of his wife's, and sect. 13 contains a proviso that nothing in the Act is to increase or diminish the liability of any woman married before the commencement of the Act for any ante-nuptial debt, except as to any separate property to which she might become entitled by virtue of the Act. Wherever a question arises on the effect of an acknowledgment or part payment on account of the ante-nuptial debt of a married woman, it will be necessary to consider the date of her marriage and the particular provisions of the Married Women's Property Act applicable to such a case. As a general rule an acknowledgment or part payment by the husband alone would not revive the liability of the wife, but would revive any right of action existing against him. An acknowledgment or part payment by the wife alone would not affect the husband, but would keep alive any rights existing against her separate estate.

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The effect of part payment or payment of interest by one of several co-contractors, or one of several executors or administrators, is now determined by the 14th section of the Mercantile Law Amendment Act, 1856 (1), which, after referring to other enactments and to the 3rd section of the statute of James, enacts as follows:—

Part payment by one co-contractor. 19 & 20 Vict. c. 97, s. 14.

“When there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors administrators of any contractor, no such co-contractor or co-debtor, executor or administrator, shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect

(1) 19 & 20 Vict. c. 97.

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or by reason only of payment of any principal, interest, or other money by any other or others of such co-contractors or co-debtors, executors or administrators.”

A husband and wife are not co-contractors in respect of an ante-nuptial debt of the wife's (1), and this enactment would not apply to them.

Where a dividend under a composition deed made by a principal debtor was paid to a creditor, and the surety, in a letter to the creditor, consented that the dividend should be received without prejudice to the creditor's claim against himself, it was decided that the payment of the dividend, coupled with the letter, did not amount to more than a “payment only” by the co-debtor; and the surety was therefore entitled to the benefit of the statute of James (2). This section was held not to be retrospective, and to have no effect in cases where the payment was made before the passing of the Act (3). It seems clear, however, both on the general principles of construction and from cases decided on the 13th section of the same statute (4), that its provisions apply to all cases of payments made since the passing of the Act, though the debt was contracted before that date. Before the passing of the statute the general effect of the cases was: First, that payment of interest or part payment by one of several co-contractors during the life of all took the case out of the statute against the rest (5) or their

(1) *Beck v. Pierce*, 23 Q. B. D. 322.

(2) *Cockrill v. Sparkes*, 1 H. & C. 699; 32 L. J. Exch. 118. See *In re Wolmerhausen. Wolmerhausen v. Wolmerhausen*, 62 L. T. 541.

(3) *Jackson v. Woolley*, 8 E. & B. 778, 784; 27 L. J. Q. B. 448, overruling on this point *Thompson v. Waithman*, 3 Drew. 628; *Cockrill v. Sparkes*, 1 H. & C. 699; 32 L. J. Exch. 118. See *Pardo v. Bingham*, L. R. 4 Ch. 735.

(4) *Archer v. Leonard*, 15 Ir. Ch. R. 267; *Leland v. Murphy*, 16 Ir. Ch. R. 500.

(5) *Whitcomb v. Whiting*, 2 Dougl. 652; 1 Smith's L. C. 9th ed. 618; *Jackson v. Fairbank*, 2 H. Bl. 340; *Pease v. Hirst*, 10 B. & C. 122; *Chippendale v. Thurston*, 4 C. & P. 98; *Wyatt v. Hodson*, 8 Bing. 309; *Channell v. Ditchburn*, 5 M. & W. 494; *Goddard v. Ingram*, 3 Q. B. 839; *Manderston v. Robertson*, 4 M. & Ry. 440.

representatives (1). And the same rule prevailed with respect to acknowledgments till the passing of Lord Tenterden's Act (2). Secondly, that in the case of joint or of joint and several debts, the death of any one of the debtors determined the joint contract, so far as he was concerned, and therefore part payment by one of the survivors did not affect his estate; nor, on the other hand, did payment by his personal representatives affect the survivors (3). Thirdly, it was doubtful whether a payment by one of several executors in his representative capacity bound his co-executors or not (4).

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Partnership debts, though joint debts, stand, during the continuance of the partnership, on a somewhat different footing from other joint debts, because, as long as the partnership exists, one partner, in making payments on account of partnership debts, may be presumed to do so as agent of the firm, and therefore to bind the firm (5); but on the dissolution of partnership by death or otherwise the agency determines, and therefore no payments made after that time can affect any other party than the person who makes them (6).

Partner-
ship debts.

Where one co-contractor becomes the executor of a deceased co-contractor and makes payments, questions have frequently arisen, especially in the case of partnerships, and will probably constantly arise whether such payments were made in the capacity of executor or co-contractor. The cases on this point before the Mercantile Law Amendment Act (7) are still of import-

Co-con-
tractor
becoming
also
executor.

(1) *Burleigh v. Stott*, 8 B. & C. 36.

(2) *Perham v. Raynal*, 2 Bing. 306; and see *Wood v. Braddick*, 1 Taunt. 104.

(3) *Atkins v. Tredgold*, 2 B. & C. 23; 3 D. & R. 200; *Slater v. Lawson*, 1 B. & Ad. 396; *Ault v. Goodrich*, 4 Russ. 430; *Way v. Bassett*, 5 Hare, 55.

(4) *Atkins v. Tredgold*, 2 B. & C. 23; *Scholey v. Walton*, 12 M. & W. 510.

(5) *Goodwin v. Parton*, 41 L. T. 91.

(6) *Thompson v. Waithman*, 3 Drew. 628; *Bristow v. Miller*, 11 Ir. L. Rep. 461; *Watson v. Woodman*, L. R. 20 Eq. 721.

(7) 19 & 20 Vict. c. 97.

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ance, because the effect of payments by a surviving co-contractor or the representative of a deceased co-contractor seems to have been the same before as since the Act. The capacity in which the payments are made is to be decided according to the circumstances of each case, and is, at law, a question for the jury. It would seem from the cases that *prima facie* the payments must be considered as made in the capacity of surviving co-contractor and not of executor (1). Cresswell, J., in a case at *Nisi Prius* (2) where a question on this point arose, refused to admit evidence as to the capacity in which the payments were made, and directed a verdict for the plaintiff. It does not appear from the report whether he considered that the payment must be taken conclusively to have been made in the capacity of co-contractor, or that the payment by the executor of a deceased co-contractor as such would bind the survivor. In either case, it is submitted that the ruling is inconsistent with the other cases on the subject.

Payment of
dividend
under a
bank-
ruptcy.

The payment of a dividend on a debt under a bankruptcy or under an inspectorship deed is not such a part payment as to imply a promise to pay the remainder (3). *Jackson v. Fairbank* (4), which was to the contrary effect, cannot now be considered law; but, as a payment by the bankrupt or insolvent can have no effect now against a co-debtor, the question can hardly arise except in the case of a bankruptcy being annulled.

Payments
by execu-
tors, heirs,
and de-
visees.

Another question presents itself closely analogous to those last discussed, namely, whether payment of interest

(1) *Atkins v. Tredgold*, 2 B. & C. 23; *Braithwaite v. Britain*, 1 Keen, 206, 221; *Scholey v. Walton*, 12 M. & W. 510; *Way v. Bassett*, 5 Hare, 55; *Fordham v. Wallis*, 10 Hare, 217; *Brown v. Gordon*, 16 Beav. 302; 22 L. J. Ch. 65; *Thompson v. Waithman*, 3 Drew. 628; and see *Winter v. Innes*, 4 My. & C. 101.

(2) *Griffin v. Ashby*, 2 O. & K. 139.

(3) *Davies v. Edwards*, 7 Exch. 22; *Ex parte Topping*, 34 L. J. Bkcty. 44.

(4) 2 H. Bl. 340.

on a debt by an executor keeps up the right of the creditor to compel legatees to refund. This has been decided in the affirmative (1), but such payment would not, it is apprehended, keep up the right if there had been otherwise such laches, acquiescence or other conduct on the part of the creditor as to make the assertion of it inequitable. Similar questions also arise where a simple contract-creditor seeks payment out of the real estate of a deceased debtor under 3 & 4 Wm. IV. c. 104, viz.:— as to the effect of acknowledgments in writing, or part payments or payments of interest by the executor, heir or devisee, or one of several devisees in keeping the debt alive against the others. It was decided as to payments before the Mercantile Law Amendment Act that payment by the personal representative would not bind the heirs or devisees or *vice versâ*, that if the executor was also beneficial devisee the character in which he made the payment could not be distinguished, and therefore the personal estate and the land devised to him would be bound; but that if the executor were also a devisee in trust, it would be a matter of evidence in what capacity he made the payment, the presumption, it seems, being that he made it as executor, and therefore that even if the payment by a trustee could bind the *cestui que trust*, the land was not bound. And it seems to have been assumed that the payment by one of several specific devisees did not bind the others (2). One of the cases (3) arose under 47 Geo. III. sess. 2, c. 74, which first made the real estate of traders subject to their simple contract debts; but that statute is for this purpose the same as the statute of Wm. IV. (4). Acknowledgments would of course be governed by the same principles. The provi-

(1) *Fordham v. Wallis*, 10 Hare, 217; 22 L. J. Ch. 548.

(2) *Putnam v. Bates*, 3 Russ. 188; *Fordham v. Wallis*, 10 Hare, 217; 22 L. J. Ch. 548; and see judgment of Kindersley, V.-C., in *Coope v. Cresswell*, L. R. 2 Eq. 119; 35 L. J. Ch. 506.

(3) *Putnam v. Bates*, 3 Russ. 188.

(4) 3 & 4 Wm. IV. c. 104.

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sions of Lord Tenterden's Act (1) as to the effect of acknowledgments, and of the Mercantile Law Amendment Act (2) as to the effect of payments, would seem not to affect this question. The actual point has been decided by Chitty, J., in a recent case (3), where he held that payment of interest on a simple contract debt of the testator by an executrix who was also beneficial devisee for life took the debt out of the statute against all parties interested in remainder (4).

Is right of
marshalling
kept
alive by
payment by
executors?

Turner, V.-C., in *Fordham v. Wallis*, seems to have decided in effect that, even when the right of a simple contract creditor against the personalty was kept alive by payment of interest by the executors, the creditor retained no indirect right against the land by means of the equity of marshalling after the direct right against it was barred. The case seems, however, to have been argued on the ground that the right of the simple contract creditors to marshal put them in the place of the specialty creditors, for the purposes of the Statutes of Limitations, as had been held in one case in Ireland (5), and therefore that the limit was twenty years and not six; and the view of Turner, V.-C., in *Fordham v. Wallis*, seems to have been that such a contention was wrong, that the cases cited did not support it, but that even if they did, now that the simple contract creditors have a direct right against the land which is clearly barred in six years, they could not be permitted to have an indirect right which would last for twenty. But in *Fordham v. Wallis*, the simple contract debts were kept alive against the personalty by payments of interest by the executor; and it does not

(1) 9 G. IV. c. 14.

(2) 19 & 20 Vict. c. 97.

(3) *In re Hollingshead. Hollingshead v. Webster*, 37 Ch. D. 651.

(4) And see *Roddam v. Morley*, 2 K. & J. 336, 341; 25 L. J. Ch. 329; on appeal, 1 De G. & J. 1; 26 L. J. Ch. 438; *Morley v. Morley*, 5 De G. M. & G. 621; *Coope v. Cresswell*, L. R. 2 Ch. 123; 36 L. J. Ch. 118.

(5) *Ellard v. Cooper*, 1 Ir. Ch. R. 376.

seem to have been pointed out to the Vice-Chancellor that to have held that the right of marshalling was thereby kept alive beyond the six years did not necessarily involve the proposition that in cases of marshalling the same limitations would be created in equity as to simple contract debts as the statute had prescribed for specialties.

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Looking at the whole question irrespective of 3 & 4 Wm. IV. c. 104, it would seem that the view of Turner, V.-C., that the period during which the right of the simple contract creditors to marshal exists is not co-extensive with the time during which the specialty creditors may come against the land, must be correct; for the right of marshalling could never put a simple contract creditor in a better position than if there had been no specialty creditors at all; it is clearly only a mode of recovering simple contract debts, and therefore ought to be limited by the time which the statute applicable to those debts allows. But to hold that the payment of interest by executors keeps up the right of marshalling beyond the six years, so far from contravening this principle, rather follows from it; the limitation of the right to marshal being measured by the period during which the simple contract creditors could come against the personalty. And, moreover, the debt being kept alive against the personalty, the simple contract creditor would have been able to recover out of it, had it not been absorbed by the specialty creditor, and the simple contract creditor would, if deprived of the benefit of marshalling, be put in a worse position than if the personalty had not so been exhausted, a result at variance with the whole principle of marshalling. Besides, the equitable right of the simple contract creditors, in a case where no debts had been paid at all before suit, to have the specialty debtors kept off the personalty was, it would seem, precisely the same as that by which, when the specialty creditors had been actually paid out of the personalty

Right of
marshalling.

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before suit, the simple contract creditors were permitted to stand in their shoes; and in the former case it would seem almost impossible to hold that if the simple contract debts had been kept alive against the personalty by payment of interest, the specialty creditor would have been permitted to go upon the personalty to the prejudice of the simple contract creditor. But, as in such a case there would be no marshalling, if the specialty debts themselves were barred against the land, so when the specialty debts have been actually paid out of the personalty, the right to marshal must, it seems, cease at the time when the specialty debts would have been barred against the land if they had not been paid. Nor is this view in any way opposed to either of the cases cited in *Fordham v. Wallis*. In both of them the simple contract debts were more than twenty years old, and therefore the question whether the right to marshal existed for so long a period as twenty years never actually arose. *Busby v. Seymour* (1) was a supplemental bill in an administration suit, and the original bill was not properly framed for obtaining relief against the realty by marshalling, and Sugden, L.C. of Ireland, held that such relief could not be granted on a bill which, though purporting to be a supplemental bill, was in fact, so far as marshalling was concerned, an original bill, and was filed more than twenty years after the debt was incurred; but he gave the decree prayed for against the personalty, as the bill was *bonâ fide* supplemental to that, and the original bill praying relief against it had been filed in proper time. In the earlier case of *Vickers v. Oliver* (2) the question also arose in a supplemental suit, and relief was given against the realty, because, as Knight Bruce, V.-C., held, the bill in the original suit was properly framed for obtaining such relief, and such relief would have been

(1) 7 Ir. Eq. R. 433; 1 J. & Lat. 527.

(2) 1 Y. & C. C. C. 211; 6 Jur. 273.

given in it, if it had not been for the mistake of all parties. It thus appears that the two cases are not inconsistent, and it is submitted that there is nothing in the facts or the judgment in either of them to show that the right of marshalling is barred before the right to *commence* a suit against the personal estate is barred, in whatever way such last-mentioned right may be kept on foot; for at the time when in the case of *Busby v. Seymour* the relief was first sought against the realty, no fresh bill could have been filed even against the personalty, and this clearly distinguishes that case from one where the debt has been kept alive by payment of interest by the executor, because then a right to bring a fresh action against the personalty still exists.

The result, it is submitted, is that before 3 & 4 Wm. IV. c. 104, the right of simple contract creditors to have the real assets marshalled in their favour was not barred, so long as the right to commence a suit against the executor was unbarred, and the right against the land of the specialty creditor in respect of whose debt the marshalling was prayed was also unbarred, or would have been, if it had not been paid out of the personalty. And, notwithstanding the decision in *Fordham v. Wallis*, there is, it is submitted, no reason why the direct right against the land given to simple contract debtors by the statute of William should in any manner abridge the indirect right which they had before. That statute was passed, not for the protection of the land but for the benefit of creditors, to give them remedies in addition to, not by way of substitution for, any which they might already have; nor can it well be said that the creditor has been guilty of laches, if he has received interest from the executor who is the proper person to whom to look for payment. Why, therefore, should the Court decline, when the new remedy fails, to give a creditor who has done nothing to render himself undeserving of it, the benefit of the same rules which were laid down in his

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favour before the new remedy was given? Nor would the decision that the direct right against the land was not kept up by the payments of the executor be thus rendered nugatory, for the simple contract creditor, being able by marshalling to get at the land only to the extent of the debt of the specialty creditor, in whose place he is allowed to stand, the remedy by marshalling is not necessarily co-extensive with his direct right under the statute, but may in many cases be much narrower.

CHAPTER VI.

ACTIONS OF TORT BY AND AGAINST EXECUTORS
AND ADMINISTRATORS.

BEFORE the passing of the Act 3 & 4 Wm. IV. c. 42, no action for injuries to the real estate of a deceased person could be brought, and no action, with certain exceptions, for wrongs committed by him could be brought against his personal representatives (1). To remedy this it was enacted by 3 & 4 Wm. IV. c. 42, s. 2, as follows:—

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—

3 & 4
W. IV.
c. 42, s. 2.

“Whereas there is no remedy provided by law for injuries to the real estate of any person deceased committed in his lifetime nor for certain wrongs done by a person deceased in his lifetime to another in respect of his property real or personal, for remedy thereof be it enacted that an action of trespass or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased for any injury to the real estate of such person committed in his lifetime for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person; and further, an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased for any wrong committed by him in his life-

(1) Williams on Executors, 7th ed. p. 1728; 8th ed. p. 1735. See *Phillips v. Homfray*, 24 Ch. D. 439.

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time to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person."

It would seem that the provisions of sect. 4 relating to disabilities do not apply to this section, and that the periods of limitation fixed are absolute. Doubts have been expressed as to whether the section applies to injuries to chattels real of a person deceased (1).

Where an intestate tortiously raised coal of the plaintiff's and sold it and received money for it more than six months before his death, and also continued raising the coal within six months of his death, it was held that the plaintiff might sue the administrator in trespass for the acts committed within six months of the death, and might also waive the tort and sue for money had and received in respect of the acts committed more than six months before the death (2). The reasoning of the decision seems to be that the administrator might have been sued in assumpsit for the whole of the injuries committed, and that by first suing in trespass by virtue of the statute for the more recent wrongs he did not preclude himself from afterwards suing in contract independently of the statute in respect of earlier acts.

An action is maintainable by virtue of this section against the executor of an innkeeper for the innkeeper's negligence or want of due diligence resulting in loss of property by a guest staying at the inn (3).

(1) *Adam v. Inhabitants of Bristol*, 2 A. & E. 389. Williams on Executors, 7th ed. p. 795; 8th ed. 802.

(2) *Powell v. Rees*, 7 A. & E. 426.

(3) *Morgan v. Ravey*, 30 L. J. Exch. 131.

By virtue of this section damages for obstruction of light to the property of the deceased person accruing within six months from the death may be recovered by his personal representative (1).

It has been held in an action for an injunction to restrain a person from polluting a brook and for damages, that, on the defendant dying more than six months after action brought, the plaintiffs could not obtain an order to continue the proceedings against the personal representatives (2).

Property was devised to a woman for life, and the devise provided that she should keep the premises in repair, and she died leaving the premises out of repair; it was held that an action for permissive waste might be brought against her executors by virtue of this section, as the non-repairing was a wrong continuing up to the day of her death (3).

(1) *Jones v. Simes*, 43 Ch. D. 607.

(2) *Kirk v. Todd*, 21 Ch. D. 484.

(3) *Woodhouse v. Walker*, 5 Q. B. D. 404.

CHAPTER VII.

IRISH STATUTES.

PART I.
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Irish
Statutes of
Limita-
tions.

IN the foregoing pages the cases decided in England and Ireland have been treated together, as if the statutes on which they were decided had been the same in both countries. In fact, however, the statutes 21 James I. c. 16, and 4 & 5 Anne, c. 3, never applied to Ireland, but Irish statutes (1) containing almost the same words were passed about the same time, which remained in force till 1853, when they were repealed by the Irish Common Law Procedure Act, 1853 (2), so far as they related to actions in the Superior Courts of Common Law in Ireland, and their provisions were incorporated in that Act. Lord Tenterden's Act (3) applied to Ireland, but by the Irish Act of 1853 it was repealed so far as it related to the Superior Courts of Law in that country, and similar provisions were re-enacted (4). The Mercantile Law Amendment Act (5) extends to Ireland, and the sections amending the law of limitation expressly refer to the Irish Act of 1853, with the exception of the 12th section, which defines what countries are not to be deemed "beyond seas," a similar definition having been previously inserted in the Irish Act itself (6).

There is a difference between one of the provisions of

- (1) 10 Car. I. Sess. 2, c. 6, Ir., and 6 Anne, cap. 10, Ir.
- (2) 16 & 17 Vict. c. 113, ss. 20, 21, 22.
- (3) 9 G. IV. c. 14.
- (4) 16 & 17 Vict. c. 113, ss. 24, 25, 26, 27.
- (5) 19 & 20 Vict. c. 97.
- (6) 16 & 17 Vict. c. 113, s. 4.

the Irish Common Law Procedure Act with respect to disabilities and the corresponding clause in the English and older Irish Acts which should be noticed. By the 22nd section of the Irish Common Law Procedure Act, 1853 (1), where a person entitled to sue is under any disability at the time when the cause of action accrues, he is required to bring his action within the prescribed time after the cessation of "such disability." It had been decided under the older Irish Act (2) relating to real property, which required such a person to bring an action within ten years next after his or her full age, discovery, coming of sound mind, enlargement out of prison, or coming into this realm, &c., that if a person entitled to sue was under one disability, and before the original disability ceased fell under another, time did not commence to run till the cessation of the last disability (3). This case was followed in England in a decision which turned on 3 & 4 Wm. IV. c. 27, s. 16, by which a person is required to bring an action within ten years next after he shall have ceased to be under "any such disability" (4), and the reasoning of the decision seems to have been that, if one disability supervenes upon another, the disability is one continuous thing although the causes may be different. It would seem that the same construction would be given to the 22nd section of the Irish Common Law Procedure Act, 1853, and that the fact that the words in 3 & 4 Wm. IV. c. 27, s. 16, are "any such disability," and in the Irish Act "such disability" would not make any difference, the words "such disability" being merely a comprehensive expression for the different kinds of disability that have been mentioned, and are not to be limited in the case of several continuous disabilities to the one which happened first.

(1) 16 & 17 Vict. c. 113.

(2) 10 Car. I. Sess 2, c. 6, s. 13, Ir.

(3) *Lessee of Supple v. Raymond*, Hayes, 6.

(4) *Borrows v. Ellison*, L. R. 6 Exch. 128.

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The statute 3 & 4 Wm. IV. c. 42 does not extend to Ireland, but the provisions of sect. 2 of that statute are applied to Ireland by sect. 31 of 3 & 4 Vict. c. 105.

The provisions of the Irish Common Law Procedure Act, 1853, apply expressly to cases of set-off (1).

The provisions of sects. 24 and 25 of the English Judicature Act, 1873 (2), relating to the concurrent administration of law and equity, and providing that rules of equity are to prevail over those of Common Law and particularly the enactment excluding from the operation of the Statutes of Limitations any claim of a *cestui que trust* against his trustee for any property held on an express trust or in respect of any breach of such trust, are applied to Ireland by sects. 27 and 28 of the Irish Judicature Act, 1877 (3).

The Trustee Act, 1888 (4), applies to Ireland. So do the Married Women's Property Acts, 1870 (5), 1874 (6), 1882 (7).

The Bankruptcy Acts, 1861 (8), 1869 (9), and 1883 (10) do not apply to Ireland with the exception of certain specified provisions.

- (1) See s. 26.
- (2) 36 & 37 Vict. c. 66.
- (3) 40 & 41 Vict. c. 57.
- (4) 51 & 52 Vict. c. 59.
- (5) 33 & 34 Vict. c. 93.
- (6) 37 & 38 Vict. c. 50.
- (7) 45 & 46 Vict. c. 75.
- (8) 24 & 25 Vict. c. 134, s. 231.
- (9) 32 & 33 Vict. c. 71, s. 2.
- (10) 46 & 47 Vict. c. 52, s. 2.

PART II.

SPECIALTIES.

CHAPTER I.

PERSONAL ACTIONS NOT WITHIN THE STATUTE OF JAMES.

THERE were many actions for the recovery of money which, as seen above, were not included in the statute of James. As to these there was no limitation in England, except so far as the doctrine of presumption of payment applied, until by 3 & 4 Wm. IV. c. 42, s. 3, it was enacted as follows:—

“All actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognizance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any *feri facias*, and all actions for penalties, damages, or sums of money given to the party grieved by any statute now or hereafter to be in force shall be commenced and sued within the time and limitation hereinafter expressed and not after; that is to say, the said actions of debt for rent upon an indenture of demise or covenant or debt upon any bond or other specialty, actions of debt or *scire facias* upon recognizance, within twenty years after the cause of such actions or

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the re-
covery of
money not
in the
statute of
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c. 42, s. 3.

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suits but not after; the said actions by the party grieved within two years after the cause of such actions or suits, but not after; and the said other actions within six years after the cause of such actions or suits but not after; provided that nothing herein contained shall extend to any action given by any statute where the time for bringing any such action is or shall be by any statute specially limited."

It was also enacted by sect. 8 of 37 & 38 Vict. c. 57, in substitution for sect. 40 of 3 & 4 Wm. IV. c. 27, as follows:—

37 & 38
Vict. c. 57,
s. 8.

"No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given."

By the 42nd section of 3 & 4 Wm. IV. c. 27 it was enacted as follows:—

3 & 4 W.
IV. c. 27,
s. 42.

"No arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action or suit but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing

shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent; provided, nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years."

The provisions of 3 & 4 Wm. IV. c. 27, and 37 & 38 Vict. c. 57, extend to Ireland; those of 3 & 4 Wm. IV. c. 42 do not; but by the 32nd, 33rd, 34th, 35th and 36th sections of 3 & 4 Vict. c. 105, commonly known as Pigot's Act, passed for the amendment of the law in Ireland, provisions were enacted almost identical with those contained in the 3rd, 4th, 5th, 6th and 7th sections of 3 & 4 Wm. IV. c. 42. These sections of Pigot's Act were repealed by the Irish Common Law Procedure Act, 1853 (1), so far as relates to actions in the superior common law courts in Ireland, and provisions in most respects similar were substituted for them (2). In the last-mentioned statute (3) actions for copyhold fines are omitted and actions upon judgments, statutes staple and statutes merchant are added to the number of actions to which the limitation of twenty years is attached. Although there was no statutable limitation in England with respect to specialties before the Act 3 & 4 Wm. IV. c. 42, in Ireland a statute was passed as early as the reign of

(1) 16 & 17 Vict. c. 113.

(2) Ss. 20-23.

(3) 16 & 17 Vict. c. 113, s. 20.

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CH. I.
—

George I. (1) relating to specialties and redemption suits. The effect of this statute was to make the presumption of payment arising from the lapse of twenty years without part payment or acknowledgment an absolute statutable bar to actions at law and suits in equity for the recovery of all debts in the nature of specialties including judgment debts. This Act seems to have been treated as superseded by 3 & 4 Wm. IV. c. 27 and Pigot's Act; and by 7 & 8 Vict. c. 90, s. 39, it was enacted that the "said later Acts" (meaning the Acts 3 & 4 Wm. IV. c. 27, and Pigot's Act) were and should be deemed to be a repeal of 8 Geo. I. c. 4, Ir. The sections of the repealed Act 8 Geo. I. c. 4, Ir., relating to specialties were for a second time expressly repealed by the Irish Common Law Procedure Act, 1853.

What
actions are
within 3 &
4 W. IV.
c. 27, s. 42;
3 & 4
W. IV.
c. 42, s. 3,
and 37 & 38
Vict. c. 57,
s. 8.

Almost all the cases of personal actions for the recovery of money, which had not been provided for by the statute of James I., are included in sect. 3 of 3 & 4 Wm. IV. c. 42, sect. 8 of 37 & 38 Vict. c. 57, or sect. 42 of 3 & 4 Wm. IV. c. 27. Thus in the words "bond or other specialty" in sect. 3 of 3 & 4 Wm. IV. c. 42, are included all specialties from the highest to the lowest, and therefore the liability of a shareholder under a deed of settlement for his proportion of the losses of the company was held to be within that section, because such liability arose from an agreement under seal (2); and the same section would apply to all actions grounded upon a statute or charter which are not brought within the provisions of the statute of James I. in the manner stated in the first chapter. An action for a *mandamus*, however, as seen above (3), is not included in any statute. In an action brought in England on a bond executed in India, it has been held that, although in India there is no difference as regards the period of limitation between specialty debts and simple contract

(1) 8 G. I. c. 4, Ir.

(2) *Re Portsmouth Banking Co.*, L. R. 2 Eq. 167.

(3) P. 13. *Ward v. Lowndes*, 1 E. & E. 940, 956; 29 L. J. Q. B. 40.

debts, yet such an action in England is governed by 3 & 4 Wm. IV. c. 42, and the period of limitation is twenty years (1).

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CH. I.
—

The Acts 3 & 4 Wm. IV. c. 27, and 37 & 38 Vict. c. 57, relate for the most part to the recovery of land, but the 8th section of 37 & 38 Vict. c. 57, and the 42nd section of 3 & 4 Wm. IV. c. 27, are concerned with the recovery not of land but money (2), and it is necessary to mention them in this chapter because some of their provisions conflict with those of the 3rd section of 3 & 4 Wm. IV. c. 42. This inconsistency arises from the fact that a sum of money charged on land may at the same time be secured by a covenant or other specialty.

Cases within 3 & 4 W. IV. c. 27; 37 & 38 Vict. c. 57, and 3 & 4 W. IV. c. 42.

As the time of limitation of 3 & 4 Wm. IV. c. 42, s. 3, and 37 & 38 Vict. c. 57, s. 8, is different, it is important to consider the bearing of the two enactments upon one another. This question is discussed below (3).

With respect to arrears of rent and interest, the time limited by 3 & 4 Wm. IV. c. 42, s. 3, and c. 27, s. 42, is also widely different, and the question has arisen in various cases which enactment is to prevail. This question is also discussed below (4), and the general result will be found to be that every remedy for the recovery of rent or interest upon money charged on land is within the words of sect. 42 of 3 & 4 Wm. IV. c. 27, but that those remedies which are enumerated in sect. 3 of 3 & 4 Wm. IV. c. 42, are excepted out of the operation of the former enactment.

Arrears of rent and interest.

By sect. 3 of 3 & 4 Wm. IV. c. 42 a limitation is provided for actions brought to recover statutory penalties by the party grieved. The effect of this provision will be discussed in a later part of this work, when the whole subject of penal actions is considered (5).

Penal actions.

- (1) *The Alliance Bank of Simla v. Carey*, 5 C. P. D. 429.
- (2) *Doe d. Jones v. Williams*, 5 A. & E. 296.
- (3) Part III. Chap. I.
- (4) Part III. Chap. IV.
- (5) Part VI.

CHAPTER II.

WHEN THE TIME BEGINS TO RUN.

PART II.
CH. II.

Same rules
applicable
as under
the statute
of James.

THE point from which the time limited by 3 & 4 Wm. IV. c. 42 is to be calculated is the same as that fixed by the statute of James I. with respect to actions thereby limited, namely, the accrual of "the cause of action or suit," and the same rules must therefore be applied to ascertain the commencement of the time in each particular case under both statutes (1). Thus in the case of a covenant or a bond the time runs, not from the date of the instrument, but from the breach of the covenant or of the condition of the bond; for instance, in the case of a *post obit* bond, the time does not begin to run till the death occurs upon which the money becomes payable (2). Where a surety covenanted jointly with the mortgagor and also separately to pay on demand the mortgage debt with interest, Chitty, J., held that in the case of the surety a demand was necessary, and that time did not run in his favour till after demand made (3). Where there are successive breaches, as, for instance, in the case of non-payment of an annuity secured by bond or covenant, a fresh cause of action arises upon each breach, so that time may be a bar to the remedy on earlier breaches without affecting the remedy

(1) See Part I. Chap. II.

(2) *Tuckey v. Hawkins*, 4 C. B. 655; *Barber v. Shore*, 1 Jebb & S. 610; *Gilman v. Chute*, 11 Ir. L. R. 442; *Kennedy v. Whaley*, 12 Ir. L. R. 54.

(3) *In re Brown. Brown v. Brown*, 37 Sol. Jo. 354.

on subsequent ones (1); and where the breach is a continuing breach, a fresh cause of action arises at every moment of the time during which the breach continues (2). Where, therefore, a tenant covenants to keep premises in repair and neglects to do so, the lessor will have a right of action on which the statute is not operating as long as the premises continue out of repair, however long that period may be; and this will be the case even though the original breach is the entire destruction of the premises the subject-matter of the covenant, so that the lessor thereupon becomes entitled to recover damages for the total amount of injury sustainable by the breach of the covenant (3). When on the sale of property the vendor covenants that he has a good title to transfer, while in fact he has not a good title, there is a breach of such covenant at the time of the sale; and there is no fresh or continuing breach when the purchaser is damaged by the title proving to be defective, or while he holds the property under such defective title (4). When transferors of shares were, under the company's deed of settlement, released from all liabilities subsequently to the transfer, but remained liable for their proportion of losses sustained by the company up to the time of transfer, it was contended that time began to run from the date of the winding-up order on the ground that no loss had been previously ascertained, and that therefore no liability to contribute had before arisen; but it was held that time began to run from the date of the transfer (5).

(1) *Sanders v. Coward*, 15 M. & W. 48; *Amott v. Holden*, 18 Q. B. 593. And see *Manning v. Phelps*, 10 Ex. 59; *Blair v. Ormond*, 17 Q. B. 423.

(2) *Maddock v. Mallett*, 12 Ir. C. L. R. 173; in error, 193, *ib.*; *Spoor v. Green*, L. R. 9 Exch. 99; 43 L. J. Exch. 57.

(3) *Maddock v. Mallett*, 12 Ir. C. L. R. 173; in error, 193, *ib.*; *Morrogh v. Alleyne*, 7 Ir. R. Eq. 487.

(4) *Spoor v. Green*, L. R. 9 Exch. 99; 43 L. J. Exch. 57.

(5) *Re Portsmouth Banking Co., Helby's, Stokes', and Horsey's Cases*, L. R. 2 Eq. 167.

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CH. II.

3 & 4
W. IV.
c. 42, s. 6.

The 6th section of 3 & 4 Wm. IV. c. 42 (1) provides that "if in any of the said actions judgment be given for the plaintiff, and the same be reversed in error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff that he take nothing by his plaint, writ or bill . . . then in all such cases the party plaintiff, his executors or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed or such judgment given against the plaintiff . . . and not after." The equitable construction put upon the corresponding section of the statute of James (2) has been extended to this section. Thus where an action on a bond abated with the death of the defendant, and no personal representative was appointed for twenty years, it was held that a fresh action on the bond might be maintained against the administrator if commenced within a reasonable time after his appointment (3). And although now (4) an action does not abate by the death either of plaintiff or defendant, if the cause of action survives, yet a fresh action can still be commenced after the death of a plaintiff or defendant by or against his personal representatives, and it is not necessary (5) to resort to the remedies provided by R. S. C., 1883, O. xvii.

(1) See 51 & 52 Vict. c. 57.

(2) 21 Jac. I. c. 16, s. 4.

(3) *Sturgis v. Darell*, 4 H. & N. 622; 28 L. J. Exch. 366; 6 H. & N. 120; 29 L. J. Exch. 472. See *ante*, p. 51.

(4) R. S. C. 1883, O. xvii.

(5) *Swindell v. Bulkeley*, 18 Q. B. D. 250.

CHAPTER III.

DISABILITY.

It is enacted by sect. 4 of 3 & 4 Wm. IV. c. 42 as follows:—

“If any person or persons that is or are or shall be entitled to any such action or suit, or to such *scire facias* is or are or shall be, at the time of any such cause of action accrued, within the age of twenty-one years, *feme covert*, *non compos mentis*, or beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they commence the same within such times after their coming to or being of full age, discover, of sound memory, or returned from beyond the seas, as other persons having no such impediment should, according to the provisions of this Act, have done; and if any person or persons against whom there shall be any such cause of action is or are or shall be at the time such cause of action accrued beyond the seas, then the person or persons entitled to any such cause of action shall be at liberty to bring the same against such person or persons, within such times as are before limited, after the return of such person or persons from beyond the seas.”

On comparing this section with the 7th section of the statute of 21 James I. c. 16, and the 19th section of 4 & 5 Anne, c. 3 (1), it appears that it provides for the same cases of disability as those two sections, except that no allowance is made for the imprisonment of the person entitled to the action; this allowance

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CH. III.
—
3 & 4
W. IV.
c. 42, s. 4.

No saving
for im-
prisonment
of plaintiff.

(1) Also called c. 16.

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CH. III.
—

Same rules
applicable
as under
the statute
of James.

under the statute of James, as well as the allowance under both the statute of James and 3 & 4 Wm. IV. c. 42 for absence beyond seas of the person entitled to the action, has, as seen above, been taken away by the Mercantile Law Amendment Act (1), so that the law with respect to disabilities stands on the same footing with regard to the classes of actions comprised in both the statutes; and the principles laid down in a former chapter (2) respecting the disabilities under the statute of James apply equally to disabilities under the statute of 3 & 4 Wm. IV. c. 42. It will therefore be sufficient to recapitulate, without discussion, the conclusions arrived at in that chapter. These are as follows:—
(a) The plaintiff during the disability can none the less bring his action. (b) The plaintiff's ignorance of the defendant's return from beyond seas does not prevent the time running. (c) The provision made for the person liable being beyond seas applies to the case of a foreigner who has never been in England, and also (d) to the case of a cause of action arising abroad even between two foreigners, although the remedy may be barred in the country where the cause of action arose, provided the liability be not actually extinguished by the law of that country. (e) In the event of one of several persons entitled to an action being under disability, and it being impossible for the rest to sue in his name, time would probably be held not to run against any until the disability had ceased. (f) By the 11th section of the Mercantile Law Amendment Act the absence beyond seas of one of several co-debtors does not prevent the time running in favour of the others; but (g) where the cause of action is not a debt it would seem that until the return of the party liable from beyond seas, time would not run in favour of the other

(1) See p. 55.

(2) Part I. Chap. III.

persons jointly liable; and (*h*) in the case of such party dying abroad, the time would probably be held to run in favour of the survivors from his death. (*i*) In the case of successive disabilities in the same person—one supervening before the other is removed—time does not begin to run till the last disability is removed. (*j*) If a person entitled to an action dies under disability, his representatives have a right of action, although the period of limitation has elapsed during his life; and (*k*) the better opinion seems to be that such right is also limited by the statute. If the representatives are executors, the time would run against them from the death of the testator; but if administrators, it is an open question whether the time would run from the death of the intestate or the grant of administration; but (*l*) where the disability of an executor supervenes upon the disability of the testator, the better opinion would seem to be that time would not run till the cessation of the executor's disability. (*m*) If a person liable to an action dies beyond the seas, his representatives are liable, although the period of limitation has elapsed during his life, and (*n*) time runs in their favour not from his death but from the grant of administration or the time when the executor proves or acts before proving. (*o*) If, however, at the time of the death the executor is absent beyond the seas, time will not run until he has both returned home and either acted in England or proved the will.

The meaning of “beyond seas” both in the statute of James and in 3 & 4 Wm. IV. c. 42, is, as before mentioned (1), defined by the 7th section of the latter statute, so that now Ireland, the Isle of Man, and the Channel Islands are not reckoned as beyond seas.

What
places are
beyond
seas.

Coverture, since the 1st January, 1883, when the Married Women's Property Act, 1882, came into opera-

Coverture.

PART II.
CH. III.

tion, is no longer a disability, and time will run against a married woman from the accrual of the cause of action (1); in the case of women married before the 1st January, 1883, if the cause of action accrued before the 1st January, 1883, time will run from that date.

(1) 45 & 46 Vict. c. 75, s. 1, sub-s. 2. *Lowe v. Fox*, 15 Q. B. D. 667; *Weldon v. Neal*, 51 L. T. 289; 32 W. R. 828.

CHAPTER IV.

ACKNOWLEDGMENTS (3 & 4 WM. IV. C. 42, s. 5).

It will be remembered that, in interpreting the statute 21 Jac. I. c. 16, the Courts introduced an exception in those cases where the party entitled to the benefit of the statute had acknowledged the debt or paid interest or part of the principal. A similar exception was introduced by the legislature itself into the statute 3 & 4 Wm. IV. c. 42, the 5th section of which enacts as follows:—

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CH. IV.
—

3 & 4
W. IV.
c. 42, s. 5.

“If any acknowledgment shall have been made either by writing signed by the party liable by virtue of such indenture, specialty or recognizance, or his agent, or by part payment, or part satisfaction, on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions, to bring his or their action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid, or in case the person or persons entitled to such action shall, at the time of such acknowledgment, be under such disability as aforesaid, or the party making such acknowledgment be at the time of making the same beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond seas, as the case may be; and the plaintiff or plaintiffs in any such action on any indenture, specialty or recognizance may by way of replication state such acknowledgment, and that such

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CH. IV.Cases
within this
section.

action was brought within the time aforesaid, in answer to a plea of this statute.”

This section does not give effect to an acknowledgment or part payment in all cases for which a limitation is provided by the third section, as it is in terms limited to the cases of actions brought on indentures of demise, specialties or recognizances, being those actions to which the limitation of twenty years is attached. Nor does any other statute provide for the cases omitted; and in all such cases, therefore, it seems that an acknowledgment can have no effect in keeping alive the right of action, unless, by the principle adopted in the construction of the statute of James, it should be held in the case of an action for a copyhold fine or an award when the submission is not under seal, that from an acknowledgment such a promise could be implied as would be a new cause of action. It does not follow that in every case where a right of action exists founded on an indenture, specialty or recognizance, the time for bringing such actions will be extended by the making of an acknowledgment, as under the fifth section a sum must be acknowledged to be due, and this can only be the case where the sum to be recovered is a definite sum, and not where it is to be recovered by way of unliquidated damages. Thus where a bond was conditioned for the replacing by a certain time of stock which the plaintiff had sold out for the defendant's benefit, and for the payment in the meantime of such sums as would be equal to the dividends of the stock, a payment on account of such last-mentioned sum was held not to have the effect of keeping alive the right of action for not replacing the stock, as the damages recoverable for such breach were unliquidated (1).

Acknow-
ledgment
by agent.

The fifth section puts an acknowledgment by an agent on the same footing with one made by the party liable

(1) *Blair v. Ormond*, 17 Q. B. 423, 436; and see above, p. 105.

himself, and in *Forsyth v. Bristowe* (1) it was held that where a mortgagor assigned the equity of redemption and the assignee paid interest on the mortgage, the latter was an agent of the mortgagor to save the limitation of the statute.

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CH. IV.
—

It has never been seriously doubted (2) but that an acknowledgment by payment must, like an acknowledgment in writing, be made by the party liable, or his agent. Where in a suit (3) for partnership accounts a receiver was appointed, and made payments to the plaintiffs on account of a debt due to them from one of the defendants under a covenant in a partnership deed, but such payments were not authorised by the terms of his appointment, nor was it proved that the defendant sanctioned their being made, it was held that the receiver was not the agent of the defendant for the purpose of making the payments, and that the payments did not prevent the operation of the statute. Nothing was said as to what would have been the effect in case the receiver had been authorised by the Court to make the payments relied on.

It has been decided, as before seen (4), that an acknowledgment, in order to be sufficient to take a debt out of the statute of James, must be such as would amount to a new promise to pay, and the question naturally arose on the construction of the present section, whether the acknowledgment required by it must be of the same nature, or whether any admission of the existence of the debt was sufficient, and whether it was necessary that such admission should be made to the party entitled or his agent. These questions, after being raised but not

(1) 8 Exch. 716; 22 L. J. Exch. 255; see *Dibb v. Walker*, 37 Sol. Jo. 355; 94 L. T. (newspaper) 484.

(2) See *Forsyth v. Bristowe*, 8 Exch. 722; *Roddam v. Morley*, 1 De G. & J. 6; *Coope v. Cresswell*, L. R. 2 Ch. 124.

(3) *Whitley v. Lowe*, 25 Beav. 421; 2 De G. & J. 704.

(4) See p. 68.

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—

determined on two other occasions (1), were for the first time decided in *Moodie v. Bannister* (2), in which Kindersley, V.-C., laid down that a promise was unnecessary, and that any admission, even one made to a stranger, was sufficient; he therefore held in that case that an admission, in the answer of an executrix in an administration suit instituted by a residuary legatee, of a debt due to a creditor prevented the statute from barring the creditor's claim when brought in under the decree. In fact, the effect of an acknowledgment under this statute differs entirely in its nature from that of an acknowledgment which takes cases out of the statute of James. In the latter case the acknowledgment operates as being a new promise of the same nature as and supporting the promise declared upon (3). In cases arising under 3 & 4 Wm. IV. c. 42, the acknowledgment cannot operate as a new promise, for a promise by specialty cannot be supported by a promise not by specialty or by any implication of a promise from a payment on account, and its real effect is to give a further time during which the action on the specialty can be brought.

Admissions
in bank-
ruptcy.

The questions regarding the sufficiency as acknowledgments of admissions made by a bankrupt in his statement of accounts or in his examination have been already discussed in the case of simple contract debts (4), and in cases falling under 3 & 4 Wm. IV. c. 27, s. 40 (now 37 & 38 Vict. c. 57, s. 8) will be found discussed below (5). It will be seen that the conclusion arrived at in the last-named cases is that such admissions are in themselves sufficient to satisfy the requirements of that statute, and

(1) *Howcutt v. Bonser*, 3 Exch. 491; *Forsyth v. Bristowe*, 8 Exch. 716; 22 L. J. Exch. 255.

(2) 4 Drew. 432; 28 L. J. Ch. 881.

(3) See above, pp. 67-69, and chapter on Pleading, Part VIII. Ch. I.

(4) Pp. 101, 102.

(5) Part III. Ch. V.

are good as acknowledgments in every case to prevent its operating as a bar, except where it is set up in the bankruptcy by the trustee or the other creditors. All the reasoning in that chapter in favour of the sufficiency of such acknowledgments applies with equal force here; and in addition, as under 3 & 4 Wm. IV. c. 42 the acknowledgment need not be made to the person entitled or his agent, the objection that such admissions are only made to a stranger is of no force; but the consequence of not allowing the acknowledgment to prevail against the trustee or other creditors will, under 3 & 4 Wm. IV. c. 42, under which there are no questions as to charges on land, render any such acknowledgment practically nugatory, except where the bankruptcy is annulled.

With respect to acknowledgments by part payment, every payment of principal is not necessarily an acknowledgment that more is due (1); and the rules for determining whether a payment has that effect, and also on account of what debt it is made, are the same as those laid down in a former chapter (2) as to actions governed by the statute of James. With respect to the fact of payment the ordinary rules of evidence apply, but the 3rd section of Lord Tenterden's Act has no application to debts governed by 3 & 4 Wm. IV. c. 42, and consequently indorsements, on the bond or other specialty, of payments made before the period of limitation has elapsed are, after the death of the person making them, admissible in evidence as proof of such payments (3). If such indorsements bear no date, their date must be proved *aliunde*; if they bear date, that fact is, it seems, evidence to go to the jury, but not conclusive evidence that they were made at the time they purport to be made. On this

Acknowledgment by part payment, how proved.

(1) *Ashlin v. Lee*, 44 L. J. Ch. 174, 376.

(2) Part I. Ch. V. See *Gleadow v. Atkin*, 1 C. & M. 410.

(3) See above, p. 121. *Searle v. Lord Barrington*, 2 Str. 826 3 Brown's P. C. 593. See *Gleadow v. Atkin*, 1 C. & M. 421; *Turner v. Crip*, 2 Str. 827; *Smith v. Battens*, 1 Moo. & R. 341.

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CH. IV.
—Effect of
acknow-
ledgment
by devisee
for life.

latter point a different opinion is expressed in Taylor on Evidence (1); but the view here given seems to be fully borne out by the judgment of Turner, L.J., in *Briggs v. Wilson* (2).

The 5th section of 3 & 4 Wm. IV. c. 42 refers only in words to cases where there is a single person liable to pay, but it has never been questioned that it extends equally to cases where several persons are so liable; and hence, questions necessarily arose as to the effect of an acknowledgment or payment by one of such persons. In *Roddam v. Morley* (3), decided by Cranworth, L.C., with the assistance of Williams and Crowder, JJ., overruling the decision of Wood, V.-C. (4), the question was whether the payment of interest on a bond by a devisee for life of the real estate of the bond debtor took the bond debt out of the statute, as against a devisee in remainder. This case was decided on the wording of 3 & 4 Wm. IV. c. 42, and without reference to the cases which arose on the similar points under the statute of James, the different nature of acknowledgments of debts governed by that statute rendering such cases inapplicable (5), and it was held that the successive devisees were persons liable by virtue of the bond, and that the payment by the devisee for life kept the action alive against the devisees in remainder. Westbury, L.C. (6), spoke of this decision as depending on the relationship of a devisee for life and a devisee in remainder of the same land; but though Lord Cranworth certainly took this relationship into consideration, yet the reasoning in the judgments clearly

(1) 8th ed. p. 610.

(2) 5 De G. M. & G. 20. See *Glynn v. Bank of England*, 2 Ves. Sen. 38; *Rose v. Bryant*, 2 Campb. 321; *Gale v. Capern*, 1 A. & E. 102; *Smith v. Battens*, 1 Moo. & R. 341; *Newbould v. Smith*, 29 Ch. D. 882.

(3) 1 De G. & J. 1; 26 L. J. Ch. 438.

(4) 2 K. & J. 336.

(5) See judgment in *Coope v. Cresswell*, L. R. 2 Eq. 120; 35 L. J. Ch. 506.

(6) See judgment in *Dickenson v. Teasdale*, 1 De G. J. & S. 62.

applies to the construction of the 5th section of 3 & 4 Wm. IV. c. 42 in every case, whether of acknowledgment or part payment, where more than one person is liable on the specialty; and it was accordingly held by Kindersley, V.-C., in *Coope v. Cresswell* (1), that payment by an administrator took the case out of the statute as against the devisees. This decision was, however, reversed on appeal by Chelmsford, L.C. (2), who, following Lord Westbury, attempted to distinguish the case before him from *Roddam v. Morley*, but in the whole of his judgment dissented from the grounds of the judgment in the latter case, and the two decisions must be considered inconsistent with one another. But it is submitted that the reasoning of the three learned judges who decided *Roddam v. Morley* was not answered by Lord Chelmsford as reported, and *Roddam v. Morley* has since been followed in preference to the decision of Lord Chelmsford in *Coope v. Cresswell* by Bacon, V.-C. (3), by Chitty, J. (4), and Kay, J. (5).

By the 14th section of the Mercantile Law Amendment Act it was enacted as follows:—

19 & 20
Vict. c. 97,
s. 14.

“In reference to the provisions of the Acts of the twenty-first year of the reign of King James the First, cap. 16, s. 3, and of the Act of the third and fourth years of the reign of King William the Fourth, cap. 42, s. 3, and of the Act of the sixteenth and seventeenth years of the reign of her present Majesty, cap. 113, s. 20, when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only, or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor or administrator shall lose the benefit of the said enactments or any of

(1) 35 L. J. Ch. 496; L. R. 2 Eq. 106.

(2) L. R. 2 Ch. 112; 36 L. J. Ch. 114.

(3) *Pears v. Laing*, L. R. 12 Eq. 41.

(4) *In re Hollingshead. Hollingshead v. Webster*, 37 Ch. D. 651; *Dibb v. Walker*, 37 Sol. Jo. 355.

(5) *Barclay v. Owen*, 60 L. T. 220.

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them so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money by any other or others of such co-contractors or co-debtors, executors or administrators" (1).

This section of the Mercantile Law Amendment Act does not appear to have any reference to cases of several persons being successively liable, and does not affect the decision in *Roddam v. Morley* (2), and the law still is that payment by a devisee will keep the debt alive as against the remainderman, for devisee and remainderman are in no sense "jointly" liable, and are not "co-debtors" (3). The 14th section of the Mercantile Law Amendment Act does not mention an acknowledgment in writing, and the result therefore is that part payment or payment of interest by one of several co-contractors or co-debtors affects only the person making it, but an acknowledgment in writing by one of several persons jointly or jointly and severally liable sets the action free altogether.

It will be noticed that sect. 14 of the Mercantile Law Amendment Act does not affect sect. 40 of 3 & 4 Wm. IV. c. 27 (now sect. 8 of 37 & 38 Vict. c. 57) (4).

Disability
at the time
of acknow-
ledgment.

By 3 & 4 Wm. IV. c. 42, s. 5, express provision is made for the case of persons who are entitled to actions within its limitations being under disability at the time when acknowledgment by payment or writing is made, and also for the case of the person who makes such acknowledgment being at the time beyond the seas. By the 10th section of the Mercantile Law Amendment Act (5), it is provided that no plaintiff shall be entitled to any extension of time for suing by reason of his being absent beyond the seas when the cause of action accrues. Although this section in terms only refers to the case of

(1) See *Watson v. Woodman*, L. R. 20 Eq. 721.

(2) 1 De G. & J. 1; 26 L. J. Ch. 438.

(3) See *In re Hollingshead. Hollingshead v. Webster*, 37 Ch. D. 657.

(4) See *post*, Part III. Ch. V.

(5) 19 & 20 Vict. c. 97.

such absence at the time of the accrual of the cause of action, it would probably be held to take away the effect of such absence at the time of an acknowledgment being made.

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No provision is made by sect. 5 of 3 & 4 Wm. IV. c. 42 for the case of any person liable other than the one making the acknowledgment being beyond seas at the time such acknowledgment is made (1); such absence can therefore have no effect to prevent the time running; but if the person making the acknowledgment were at the time of making it beyond seas, the effect of the 5th section was that the action was set free altogether, and time would not run till his return either against him or against any of the other persons liable (2). The 11th section of the Mercantile Law Amendment Act provides that in the case of joint debtors the absence of any of them beyond seas at the time when the cause of action accrues shall not extend the time for suing any of the others who are not at that time beyond seas; and this section would probably be held to extend to the case where one of several joint debtors is beyond seas at the time when he makes the acknowledgment, as well as to the case in terms mentioned of such absence at the time of the accrual of the cause of action. And, if this be so, the absence abroad of one joint debtor at the time of his making an acknowledgment will not have any effect in prolonging the time for suing any other person liable.

Mercantile
Law
Amend-
ment Act,
s. 11.

Assuming this to be the correct interpretation of the 11th section of the Mercantile Law Amendment Act, and taking that section along with the 5th section of 3 & 4 Wm. IV. c. 42, the result is as follows:—Supposing A. and B. to be joint debtors. As to acknowledgments in writing. (i.) A. being abroad acknowledges, B being within seas; then time runs in favour of A. from

(1) See *Roddam v. Morley*, 1 De G. & J. 14.

(2) *Roddam v. Morley*, 1 De G. & J. 1, 10, 19.

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his return, and in favour of B. from the date of the acknowledgment. (ii.) A. being within seas acknowledges, B. being abroad; the time runs in favour of both from the date of the acknowledgment. When all the joint debtors are abroad at the time of the acknowledgment made, the 11th section of the Mercantile Law Amendment Act does not apply, and the case is governed by the 5th section of 3 & 4 Wm. IV. c. 42, as interpreted in *Roddam v. Morley* (1); and therefore (iii.) if, A. and B. being both abroad, A. acknowledges, time runs in favour of both from A.'s return. (iv.) If A. and B., being both abroad, give a joint acknowledgment, time, it seems, does not run in favour of either till both have returned.

The observations which have been made concerning acknowledgments in writing hold good with respect to part payments made before the passing of the Mercantile Law Amendment Act. But the 14th section of that Act has, as we have seen, done away with the effect of a part payment by one joint debtor since that Act in binding any other party jointly liable.

If the person liable makes an acknowledgment abroad and dies without returning, the principles laid down in the last chapter (2) will apply.

(1) 1 De G. & J. 1; 26 L. J. Ch. 438.

(2) Page 151.

PART III.

THE RECOVERY OF MONEY CHARGED UPON LAND.

CHAPTER I.

ACTIONS WITHIN 3 & 4 WM. IV. c. 27, s. 40, OR
37 & 38 VICT. c. 57, s. 8.

BEFORE the passing of the Act 3 & 4 Wm. IV. c. 27, there was no limit of time to the recovery of money charged upon land, *i.e.* so far as it was claimed out of the land. The fact of its being charged did not, however, prevent the effect of the statute of James I. in limiting such *personal* remedies for the same debt as fell within its provisions (1). This would occur, for instance, in the case of money lent upon a simple deposit of title deeds, or on a mortgage without a covenant for payment, or in the case of an action against the executors of a debtor for a simple contract debt charged on his lands by his will. Such actions must be brought within the time limited for recovering simple contract debts.

By 3 & 4 Wm. IV. c. 27, s. 40, actions to recover money charged on land were required to be brought within twenty years from the time when the right to receive the same accrued to some persons capable of

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Personal
remedies
for money
charged on
land.

(1) See *Toplis v. Baker*, 2 Cox, 118, 123; *Brocklehurst v. Jessop*, 7 Sim. 438.

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giving a discharge. And by the 8th section of 37 & 38 Vict. c. 57, which is substituted for sect. 40 of 3 & 4 Wm. IV. c. 27, the period of limitation is reduced to twelve years. The enactment (37 & 38 Vict. c. 57, s. 8) is as follows:—

37 & 38
Vict. c. 57,
s. 8.

“No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable or his agent to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one was given.”

Foreclo-
sure suits.

The 40th section of 3 & 4 Wm. IV. c. 27 (now the 8th section of 37 & 38 Vict. c. 57) relates only to the recovery of money, and therefore does not affect any proceeding which a mortgagee has a right to take for obtaining possession of the land itself (1). The question more than once arose whether foreclosure suits were suits for the recovery of money secured by mortgage within 3 & 4 Wm. IV. c. 27, s. 40 (now 37 & 38 Vict. c. 57, s. 8), or suits for the recovery of land within the 2nd section of 3 & 4 Wm. IV. c. 27 (now sect. 1 of 37 & 38 Vict. c. 57) and the 24th section of the same statute (2). But it is

(1) *Doe v. Williams*, 5 A. & E. 291, 296; *In re Conlan's Estate*, 29 L. R. Ir. 199.

(2) *Dearman v. Wyche*, 9 Sim. 570; *Du Vigier v. Lee*, 2 Hare, 326; *Wrixon v. Vize*, 3 D. & War. 104.

now settled, in accordance with the opinion of Lord St. Leonards, when Lord Chancellor of Ireland (1), that foreclosure suits are suits to recover land (2). PART III.
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There is a dictum of Littledale, J. (3), that "The 40th section" (i.e. of 3 & 4 Wm. IV. c. 27) "relates to actions brought to recover the money, and those actions, in the case of mortgages, are either on the covenant usually inserted in the mortgage deed or on the bond which commonly accompanies it." The Act 3 & 4 Wm. IV. c. 27, the 40th section of which limited the time for recovering money charged on land, was passed on the 24th July, 1833. In the same session of Parliament, but three weeks later, was passed the Act 3 & 4 Wm. IV. c. 42, the 3rd section of which limited the time for bringing actions on specialties. The period of limitation prescribed by both enactments was twenty years, and therefore it was of no practical importance to consider which of the two sections limited the right to recover. No express provision was made in the 40th section of 3 & 4 Wm. IV. c. 27 for the disability of a person entitled, and therefore in some cases, such as that of the person entitled having been absent beyond seas, it might have been necessary to deal with this question. But it is believed that there is no reported decision on the point. A similar question, however, soon arose as to the right to recover arrears of money charged on land which were also secured by covenant. The 42nd section of 3 & 4 Wm. IV. c. 27 limited the recovery of arrears of money charged on land to six years. The wording of the 40th and 42nd sections is very similar, and the same reasoning would seem to apply in dealing with cases falling within 3 & 4 Wm. IV. c. 42, s. 3, and 3 & 4 Wm. IV. c. 27, s. 42. In the latter class of cases with respect to the right to recover arrears

3 & 4
Wm. IV.
c. 27, s. 40,
and 3 & 4
Wm. IV.
c. 42, s. 3.

(1) *Wrixon v. Vize*, 3 D. & War. 104.

(2) *Heath v. Pugh*, 6 Q. B. D. 345; *Pugh v. Heath*, 7 App. Cas. 235.

(3) *Doe v. Williams*, 5 A. & E. 296.

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Effect of
37 & 38
Vict. c. 57,
s. 8 on
3 & 4
W. IV.
c. 42, s. 3.

it was decided, after some conflict of authority, that the provisions of 3 & 4 Wm. IV. c. 27, s. 42 applied to the right to recover arrears out of the land, and 3 & 4 Wm. IV. c. 42, s. 3 to actions on the covenant (1). When the Real Property Limitation Act, 1874 (2) came into operation, the period of limitation for the recovery of money charged on land or rent was reduced to twelve years, and as the provisions of 3 & 4 Wm. IV. c. 42, s. 3 remained unaltered, it became an important question whether personal actions to recover, under a covenant or other specialty, money charged on land must be brought within twelve years, the time mentioned in the 8th section of the Act of 1874, or might be brought at any time within twenty years, the period of limitation prescribed for actions on specialties by 3 & 4 Wm. IV. c. 42, s. 3.

Covenant
in mort-
gage deed.

It was decided by the Court of Appeal that the 8th section of 37 & 38 Vict. c. 57 applies to an action on the covenant in a mortgage deed as well as to the remedy against the land (3). Following this decision, Fry, J., held that when a mortgage deed was secured by a collateral bond of the mortgagor, the right of action on the bond is barred by that section at the end of twelve years from the last acknowledgment or payment of interest (4).

Collateral
bond by
sureties.

Where an estate was mortgaged, and on the same day a bond was executed by two sureties to secure the mortgage debt, the mortgagor not being a party to the bond, it was held by the Court of Appeal that the remedy of the mortgagee against the sureties was not within the 8th section of 37 & 38 Vict. c. 57 (5). By a mortgage deed the mortgagor and a surety jointly and severally

(1) See below, Part III. Ch. IV.

(2) 37 & 38 Vict. c. 57.

(3) *Sutton v. Sutton*, 22 Ch. D. 511.

(4) *Fearnside v. Flint*, 22 Ch. D. 581.

(5) *In re Powers. Lindsell v. Phillips*, 30 Ch. D. 291.

covenanted for the repayment of the mortgage debt. It was held by Kay, J., and Bowen, L.J., that the section did not apply to an action on the covenant brought against the surety; Cotton, L.J., was of opinion that the section applied to an action against the surety as well as to one against the mortgagee (1). If the remedy against a surety remains unbarred after that against the mortgagor is barred, it is presumed that the surety is entitled to recover from the mortgagor as the principal debtor the amount which the surety may be compelled to pay in satisfaction of the debt.

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In *Sutton v. Sutton* (2) no reference was made by Jessel, M.R., or Bowen, L.J., to *Hunter v. Nockolds* (3) and the other cases decided on the construction of the 40th section of 3 & 4 Wm. IV. c. 27 in connection with the 3rd section of 3 & 4 Wm. IV. c. 42. Cotton, L.J., distinguished *Hunter v. Nockolds* from the case before him on the ground that 3 & 4 Wm. IV. c. 27 and 3 & 4 Wm. IV. c. 42 were passed in the same session of Parliament, while the section under discussion was part of a later enactment (4). The wording of the 9th section of the Real Property Limitation Act, 1874, with reference to the substitution of sect. 8 for the 40th section of 3 & 4 Wm. IV. c. 27 is so far as is material as follows:—

“All the provisions of the Act (3 & 4 Wm. IV. c. 27), except those contained in the several sections thereof next hereinafter mentioned, shall remain in full force, and shall be construed together with this Act, and shall take effect as if the provisions hereinbefore contained were substituted in such Act for the provisions contained in the sections thereof numbered two, five, sixteen, seventeen, twenty-three, twenty-eight, and forty respectively.”

37 & 38
Vict. c. 57,
s. 9.

(1) *In re Frisby. Allison v. Frisby*, 43 Ch. D. 106.

(2) 22 Ch. D. 511.

(3) 1 McN. & G. 640; 19 L. J. Ch. 177.

(4) 22 Ch. D. 518.

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In a recent case in (1) Ireland, Porter, M.R., treated the decision in *Sutton v. Sutton* as getting rid of the decision in *Hunter v. Nockolds*, and the two cases seem to be irreconcilable.

By a lease made in 1859 mines were demised to the lessees, they yielding and paying certain dead rents and royalties, and yielding and paying a rent or royalty on minerals conveyed by the lessees, or by their authority, from other lands over the surface of the land, and the lessees covenanted to pay the rents and royalties reserved. In 1883 an action was brought to recover royalties in respect of minerals so conveyed since 1866. It was held by North, J., that these royalties were not secured on land, and were not therefore within 37 and 38 Vict. c. 57, s. 8, and therefore the lessors were entitled to recover all the arrears of royalties claimed (2). And it has been decided recently in Ireland (3) that sect. 8 of 37 and 38 Vict. c. 57 does not apply to an action for rent due under a covenant in an indenture of demise, that such an action is governed by sect. 20 of 16 and 17 Vict. c. 113 (corresponding to sect. 3 of 3 & 4 Wm. IV. c. 42), and that twenty years' arrears are recoverable.

Judgments.

Judgments are not mentioned in the 3rd section of 3 and 4 Wm. IV. c. 42, and therefore the 40th section of 3 and 4 Wm. IV. c. 27 (now the 8th section of 37 and 38 Vict. c. 57) extends to all proceedings of whatever kind for enforcing them (4), including the writ of *sci. fa.* (5), and the proceedings substituted for that writ by the 129th section (now repealed) of the Common Law Procedure Act, 1852 (6), and the proceedings now in force under R. S. C.,

(1) *In re Nugent's Trusts*, 19 L. R. Ir. 147.

(2) *Darley v. Tennant*, 53 L. T. 257.

(3) *Donegan v. Neill*, 16 L. R. Ir. 309.

(4) *Henry v. Smith*, 4 Ir. Eq. R. 502; 2 D. & War. 381; *O'Hara v. Creagh*, 3 Ir. Eq. R. 179; *Long & Town*, 65; *Watson v. Birch*, 15 Sim. 523; *In re Lake's Trust*, 63 L. T. 417.

(5) *Watters v. Lidwill*, 9 Ir. L. R. 362.

(6) 15 & 16 Vict. c. 76.

1883, O. XLII. r. 23 (1) and including a petition in bankruptcy (2) or an administration action (3) brought by a judgment creditor. The right to issue execution on a judgment is limited to a much shorter time; this was, at common law, a year and a day, but was extended to six years by the 128th section of the Common Law Procedure Act, 1852 (4); that section is now repealed, but by R. S. C., 1883, O. XLII. r. 22 (5), as between the original parties to a judgment, execution may issue at any time within six years from the recovery of the judgment, and by r. 23, even after the expiration of the six years with the leave of the Court or a Judge. But execution cannot be issued on a judgment when more than twelve years have elapsed since the date of the judgment, and there has been no acknowledgment or payment in respect of the judgment debt (6). A garnishee, against whom proceedings under R. S. C. 1883, O. XLV. (7) have been taken, may be ordered to pay a judgment debt, although more than six years have elapsed since the judgment (8). The word judgment in sect. 8 of 37 and 38 Vict. c. 57 is not confined to a judgment which is a charge on the land, but refers to judgments generally (9). But judgment means, it would appear, judgment of an English Court; the limitation to an action on a judgment in a foreign court is that provided by the statute of James (10).

A final decree of a Court of Equity for the payment of a specific sum of money was considered as included by

Decree in
Equity.

(1) R. S. C. Ir. 1891, O. XLII. r. 25.

(2) *Ex parte Tynte. In re Tynte*, 15 Ch. D. 125.

(3) *Sherwood v. Hannan*, 17 L. R. Ir. 270; 18 L. R. Ir. 170.

(4) 15 & 16 Vict. c. 76.

(5) R. S. C. Ir. 1891, O. XLII. r. 24.

(6) *Jay v. Johnstone* (1893), 1 Q. B. 25, 189; *Evans v. O'Donnell*, 18 L. R. Ir. 170.

(7) R. S. C. Ir. 1891, O. XLV.

(8) *Fellows v. Thornton*, 14 Q. B. D. 335.

(9) *Hebblethwaite v. Peever*, 1892, 1 Q. B. 124; *Jay v. Johnstone*, (1893) 1 Q. B. 25, 189; *Evans v. O'Donnell*, 18 L. R. Ir. 170. See *Ex parte Tynte. In re Tynte*, 15 Ch. D. 125.

(10) *Dupleix v. De Roven*, 2 Vern. 540.

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analogy in the word judgment in sect. 40 of 3 & 4 Wm. IV. c. 27 (1). Now by the definition clause of the Judicature Act, 1873 (2), s. 100, judgment for the purposes of that Act includes decree (3).

Vendor's
lien.

The lien of a vendor for his purchase money was held (4) to be within sect. 40 of 3 & 4 Wm. IV. c. 27 (now sect. 8 of 37 & 38 Vict. c. 57). The words "any sum of money secured by any lien or otherwise charged upon any land or rent," are comprehensive enough to embrace any kind of charge whatever (5).

Legacies.

All legacies whether charged on land or not (6), including annuities if charged on personalty only (7), and also a residue bequeathed by will or share of such residue (8), are within the meaning of the word "legacy" in sect. 40 of 3 & 4 Wm. IV. c. 27 or sect. 8 of 37 & 38 Vict. c. 57; and it would seem that after the time limited by these sections is expired, an action of trover for a specific legacy assented to by the executors would be barred, although the assent was so long withheld that the action would not be barred by the statute of James (9). An annuity given by will, which, though primarily payable out of personalty is also charged on realty, is not a legacy within sect. 8 of 37 & 38 Vict. c. 57, but is rent and is governed by sect. 1 of 37 & 38 Vict. c. 57, and not by sect. 8. If the instalments due under such an annuity are not paid for twelve years, the annuity is extinguished, although in the case of an

(1) *Dunne v. Doyle*, 10 Ir. Ch. R. 502.

(2) 36 & 37 Vict. c. 66.

(3) See Supreme Court of Judicature Act (Ireland), 1877 (40 & 41 Vict. c. 57), s. 3.

(4) *Toft v. Stephenson*, 7 Hare, 1; 1 De G. M. & G. 28; 21 L. J. Ch. 129.

(5) See *Hornsey Local Board v. Monarch Investment Building Society*, 24 Q. B. D. 1.

(6) *Sheppard v. Duke*, 9 Sim. 567.

(7) *In re Ashwell's Will*, John. 112. See *Dower v. Dower*, 15 L. R. Ir. 264.

(8) *Prior v. Horniblow*, 2 Y. & C. Exch. 200; *Christian v. Devereux*, 12 Sim. 264. See *Adams v. Barry*, 2 Coll. 285.

(9) See Ch. II. *infra*.

annuity not charged on land, the annuity is not extinguished by non-payment of instalments for any lapse of time (1).

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Where a legacy was left to an executor upon trust, and he separated it from the assets and afterwards applied it to his own use, it was held that by such severance the executor became a trustee of the fund, which ceased to bear the character of a legacy as soon as it assumed that of a trust fund; that sect. 40 of 3 & 4 Wm. IV. c. 27 did not apply, and that time was no bar to the recovery of the fund by the persons beneficially interested (2). In this case there was no doubt that the executor had ceased to act as executor and had actually acted as trustee, because he admitted in his answer that he had set apart the money for the purposes of the trust, and had at first paid some interest to the parties entitled.

Where
executor
acts as
trustee.

The question has, however, frequently arisen quite irrespectively of the Statute of Limitations, under what circumstances, when a legacy or residue has been bequeathed to executors on trust, the character of executor merges in that of trustee, it being clearly decided, as will be seen hereafter, that nothing in this section prevents the application of the rule that (apart from cases affected by the Trustee Act, 1888) no time will be a bar as between a *cestui que trust* and trustees. It is submitted that whatever could effect such merger of character for other purposes, would effect it so as to deprive the executors of the benefit of the statute. Such merger is, it seems, effected by any act which amounts to an assent to the legacy (3); and in the case of a residue by the residue being ascertained without more specific appropriation, but

(1) *Dower v. Dower*, 15 L. R. Ir. 264.

(2) *Phillipo v. Munnings*, 2 Myl. & C. 309; see *Harcourt v. White*, 28 Beav. 303; 30 L. J. Ch. 681; *Cadbury v. Smith*, L. R. 9 Eq. 37; *O'Reilly v. Walsh*, 6 Ir. R. Eq. 555; 7 Ir. R. Eq. 167.

(3) *Byrchall v. Bradford*, 6 Madd. 13, 235; *Dix v. Burford*, 19 Beav. 409; see judgment in *Brougham v. Poulett*, 19 Beav. 133, 134.

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not until it has been ascertained (1). If a legacy is bequeathed *simpliciter* and not to the executor upon trust, still if the executor by any act of his own constitute himself trustee for the legatee, the principle of *Phillipo v. Munnings* will apply, and the legatee will not be barred by the statute (2). Unless the legacy is vested in the executor on express trusts, the statute will run in his favour, an implied or constructive trust will not prevent the statute running (3).

Personal
estate of
intestate.

23 & 24
Vict. c. 38,
s. 13.

No limitation was made by the Act 3 & 4 Wm. IV. c. 27 in the case of a residue undisposed of by will, or of the personal estate of an intestate. But by a later Act, 23 and 24 Vict. c. 38, s. 13, reciting the 40th section of 3 & 4 Wm. IV. c. 27, and that it was expedient to extend the enactment to the case of claims to the estates of persons dying intestate, it was enacted as follows :

“No suit or other proceeding shall be brought to recover the personal estate or any share of the personal estate of any person dying intestate possessed by the legal personal representative of such intestate, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of such estate or share or some interest in respect thereof shall have been accounted for or paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person accountable for the same or his agent, to the person entitled thereto or his agent ; and in such case no such action or suit shall be brought, but within twenty years after such accounting,

(1) *Willmott v. Jenkins*, 1 Beav. 401 ; *Ex parte Dover*, 5 Sim. 500 ; *Davenport v. Stafford*, 14 Beav. 319, 331 ; *Dinsdale v. Dudding*, 1 Y. & C. C. 265 ; *Freeman v. Dowding*, 2 Jur. N. S. 1014 ; *Downes v. Bullock*, 25 Beav. 54 ; 9 H. L. C. 1. *In re Smith. Henderson-Roe v. Hitchins*, 42 Ch. D. 302.

(2) *Tyson v. Jackson*, 30 Beav. 384.

(3) *In re Davis. Evans v. Moore* (1891), 3 Ch. 119. See *In re Rowe*, 58 L. J. Ch. 703.

payment or acknowledgment, or the last of such accountings, payments or acknowledgments, if more than one was made or given " (1).

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This enactment does not in words extend to the case of a testator who has not disposed of the whole of his property, but such a case would naturally appear to come within the equity of the section. It is believed, however, that the point has never been decided, and it must be observed that by the 11 Geo. IV. and 1 Wm. IV. c. 40, the executor was declared to be a trustee for the next of kin of any residue undisposed of, and though, had the Act 23 & 24 Vict. c. 38 expressly mentioned such a residue, it would clearly have taken effect, notwithstanding the relation of trustee and *cestui que trust* existing by virtue of 11 Geo. IV. and 1 Wm. IV. c. 40 between the executor and next of kin, yet it is at least doubtful whether such relation must not be considered to preclude 23 & 24 Vict. c. 38 from applying to such residue by mere implication or equitable construction. It would have seemed that the provisions of 23 & 24 Vict. c. 38, s. 13, were intended to put the remedy of the next of kin against an administrator in the same position as that of a legatee against an executor. Lord Romilly, M.R., expressed an opinion that the Act applied only to assets distributed by the administrator, and not to assets retained by him, at least when the existence of such assets was unknown (2). But Chitty, J., in the case of *In re Johnson, Sly v. Blake* (3), expressed his disapproval of the view of Lord Romilly. The 13th section of 23 & 24 Vict. c. 38 applies to cases of intestates who died before as well as to those who die after the passing of the Act (4). With respect to assets of an intestate received within twenty years of the issue of the writ, the claim of the next of kin to administration limited to

Testator
leaving
part undis-
posed of.

(1) See *Willis v. Beauchamp*, 11 P. D. 59.

(2) *Reed v. Fenn*, 35 L. J. Ch. 464; 14 W. R. 704.

(3) 29 Ch. D. 964, 973.

(4) *In re Jennens. Willis v. Earl Howe*, 50 L. J. Ch. 4. *In re Johnson. Sly v. Blake*, 29 Ch. D. 964, 969.

PART III. those assets is not barred (1). The 13th section of 23 &
CH. I. 24 Vict. c. 38 and the 40th section of 3 & 4 Wm. IV.
c. 27 (now the 8th section of 37 and 38 Vict. c. 57) are *in
pari materia* and ought to be construed together (1).

The enactment 23 & 24 Vict. c. 38 is not referred to or affected by the Real Property Limitation Act, 1874 (2), and therefore the period allowed for the commencement of an action to recover the personal estate of an intestate is still twenty years, although the time limited for the recovery of a legacy is twelve years.

By the Intestates Estates Act, 1884, s. 3 (3), it is provided that no information or other proceeding on the part of the Crown shall be filed or instituted, and no petition of right shall be presented in respect of the personal estate of any deceased person, or any part or share thereof, or any claim thereon except within the same time and subject to the same rules of law and equity in and subject to which an action for the like purpose might be brought by or against a subject.

A change in the law relative to the limitation of time governing legacies or sums of money charged on land and secured by express trusts was introduced by sect. 10 of 37 & 38 Vict. c. 57, but this section will be more conveniently discussed hereafter (4).

(1) *In re Johnson. Sly v. Blake*, 29 Ch. D. 970.

(2) 37 & 38 Vict. c. 57.

(3) 47 & 48 Vict. c. 71.

(4) See *post*, Part V. Ch. XIX.

CHAPTER II.

WHEN TIME BEGINS TO RUN UNDER 3 & 4 WM. IV.
C. 27, s. 40, AND 37 & 38 VICT. c. 57, s. 8.

UNDER the 40th section of 3 & 4 Wm. IV. c. 27 (now sect. 8 of 37 & 38 Vict. c. 57), the period of limitation is reckoned from the time when a present right to receive the money has accrued to some person capable of giving a discharge for the same. The concurrence of two events is therefore necessary—first, the money becoming payable, and secondly, the existence of a person capable of giving a discharge for it. Since the accrual of a cause of action for the recovery of money must be contemporaneous with its becoming payable, the occurrence of this requisite for the time beginning to run must be ascertained by the same rules as the commencement of the period of limitation under the statutes before discussed. Thus, where a judgment was entered upon a warrant of attorney on a *post obit* bond, it was held that the time, as in the case of an action on the bond itself, did not run until the occurrence of the death upon which the bond became payable (1). The right of a vendor to receive his purchase-money, which is secured by his lien on the land sold, does not accrue within the meaning of this section until the time for completion arrives, or until the title is accepted, if that is subsequent to the time fixed for completion (2).

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Judgment
on *post*
obit bond.

Vendor's
lien.

(1) *Barber v. Shore* 1 Jebb & S. 610; *Gilman v. Chute*, 11 Ir. L. R. 442; *Kennedy v. Whaley*, 12 Ir. L. R. 54; see above, Part II. Ch. II.

(2) *Toft v. Stevenson*, 5 De G. M. & G. 735.

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CH. II.Remainder-
man's lien.

If the tenant for life of an incumbered estate fails to pay the interest on the incumbrances and a part of the incumbered property is sold to satisfy the interest, the remainderman is entitled to a charge or lien on the life estate, but he has no present right to receive the money till the death of the tenant for life, and therefore time does not run against the remainderman in respect of such a charge or lien until his interest falls into possession (1).

Revivor of
judgments.

In the case of judgments, however, it has been questioned whether or not a new period from which the statute begins to run afresh is given by revivor, the real point involved being whether, when a right to receive has once existed, it can accrue a second time within the meaning of the Act, or whether the time must always be reckoned from its first accrual. In Ireland, where by statute (2) judgments were assignable at law, and consequently were always, before 13 & 14 Vict. c. 29, looked on as common assurances (3), and kept alive as real securities for long periods, the opinion of the judges was almost from the first in favour of the view that time would run afresh from the date of the revivor (4). In one case the question came before the House of Lords (5) on appeal from the Exchequer Chamber in Ireland (6), but no decision was given upon it, as the House of Lords reversed the decision of the Court below on a point of pleading, holding that the judgment in *sci. fa.* relied on could not, as was held below,

(1) *Kirwan v. Kennedy*, 3 Ir. R. Eq. 472.

(2) 9 G. II. c. 5, Ir.

(3) Carleton on Judgments, p. 1.

(4) *Crofts v. Hewson*, 5 Ir. L. Rec. N. S. 263; 2 Jon. 499; *Kealey v. Bodkin*, S. & Sc. 211; 5 Ir. L. Rec. N. S. 224; *Finch v. Fitzgibbon*, 6 Ir. L. Rec. N. S. 312; *Ottiwell v. Dunbar*, 6 Ir. L. Rec. N. S. 10; *Ottiwell v. Farran*, S. & Sc. n. 218; *Ryan v. Cambie*, 2 Ir. Eq. R. 328; *contra Bolton v. Armstrong*, 5 Ir. L. Rec. N. S. 37.

(5) *Farran v. Beresford*, 10 C. & F. 319; 5 Ir. L. R. 487.

(6) *Ottiwell v. Farran*, 2 Ir. L. R. 110; 2 Jebb & S. 97; sub nom. *Farran v. Beresford*, 1 Smythe, 297.

be taken advantage of by replication. Tindal, C.J., however, in delivering the opinion of the judges, intimated that, whatever might be the case, if the revivor was between the same parties and was only necessary because the time for execution had elapsed, a new present right to receive was given by the judgment in *sci. fa.* when that writ was necessary in consequence of the death of the parties, as was the fact in the case before the House of Lords, and indeed in every case in which the point had occurred. This doctrine was approved by Lyndhurst, L.C., in giving judgment, and was in the next year expressly affirmed in the House of Lords in a precisely similar case (1), where no question arose on the form of the pleadings. So far, therefore, as regards a revivor against the representatives of a deceased party to the existing judgment, the law was settled (2). Lord St. Leonards in his essay on the Real Property Statutes (3), and Mr. Prideaux in his treatise on Judgments (4), seem to treat the cases referred to above as deciding the point generally, whatever might be the nature of the revivor; but neither of the cases in the House of Lords can be considered as deciding the effect of a revivor between the original parties. The point arose in Ireland, and it was decided in the case of *Griffin v. Blake* (5) by Cusack-Smith, M.R., that time began to run afresh from such revivor as well as from a revivor where there was a change of parties. This decision was confirmed by the judgment of the Committee of the Privy Council on appeal from the Incumbered Estates Commissioners (6), and must be considered law in

(1) *Farrell v. Gleeson*, 11 C. & F. 702.

(2) See *Conlan v. Bodkin*, 7 Ir. L. R. 467; and *Kirkwood v. Lloyd*, 11 Ir. Eq. R. 561; on appeal, 12 Ir. Eq. R. 585.

(3) Page 123.

(4) Page 57.

(5) 2 Ir. Ch. R. 645.

(6) *In re Blake*, 2 Ir. Ch. R. 643.

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Ireland (1). It is clear that the nature of the Irish judgments before alluded to had a great effect upon the minds of the Irish judges. There is no decision on the point in England, but Tindal, C.J., seems to have thought that the question depended on whether an action would lie on a judgment on a *sci. fa.* between the original parties (2), and if it depends on this the distinction would seem to cease, as it is probable that under the practice before the Common Law Procedure Act, 1852 (3), such an action would have lain (4). The action of *sci. fa.* or the writ of revivor substituted for it by the Common Law Procedure Act, 1852 (5), was of a mixed nature, being for some purposes an original action, and for others only a continuation of the former action (6). The subject-matter of the plaintiff's claim was not given by the judgment of revivor, and the effect of a judgment of revivor was to give the plaintiff a new right to receive the benefit of the original judgment or the money secured by it, and the form of the judgment in revivor was the same, whoever were the parties (7).

What lands
were bound
by revivor
of a judg-
ment.

Although a judgment of revivor was in some sense a continuation of the original judgment, yet, according to the weight of authority, it would not revive the original judgment as against any of the lands of the conusor which previous to the revivor had come into the hands of persons neither parties nor privies to the revivor; nor would a judgment of revivor against an executor have

(1) See *Johnson v. Bell*, 6 Ir. C. L. R. 526. *Irish Land Commission v. Junkin*, 24 L. R. Ir. 40.

(2) *Farran v. Beresford*, 10 C. & F. 319; 5 Ir. L. R. 487.

(3) 15 & 16 Vict. c. 76.

(4) See as to Ireland the Common Law Procedure Act, 1853 (16 & 17 Vict. c. 113), ss. 148–154, now repealed (except s. 153), see 55 & 56 Vict. c. 19.

(5) *Obrian v. Ram*, 3 Mod. 186; *Woodyeer v. Gresham*, Holt, 101; see 2 Lord Raymond, 1050; Fitzherbert N. B. 122 E.; Vin. Abr. tit. Debt, M. 13 & 14. See Carleton on Judgments, 182.

(6) See *Wall v. Walsh*, 4 Ir. R. C. L. 103.

(7) See *Conlan v. Bodkin*, *arguendo*, 7 Ir. L. R. 470.

revived the original judgment against the heir or *vice versâ* (1). Where, however, land had been settled subsequently to the original judgment, a revivor against a person in possession under the settlement would have bound all those who claimed reversionary or contingent interests in the same land under the settlement (2).

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The sections of the Common Law Procedure Act, 1852, relating to revivor are repealed, and it would seem that the writ of revivor and judgment of revivor are now abolished. The procedure substituted for the writ of revivor is to be found in R. S. C., 1883, O. XLII., rr. 22 & 23 (3). These rules are as follows:—

Revivor
abolished.

R. 22. "As between the original parties to a judgment or order, execution may issue at any time within six years from the recovery of the judgment or the date of the order.

R. S. C.,
1883, O.
XLII. rr.
22 & 23.

R. 23. "In the following cases, viz.:

"(a) Where six years have elapsed since the judgment or date of the order, or any change has taken place by death or otherwise in the parties entitled or liable to execution.

"(b) Where a husband is entitled or liable to execution upon a judgment or order for or against a wife.

"(c) Where a party is entitled to execution upon a judgment of assets *in futuro*.

"(d) Where a party is entitled to execution against any of the shareholders of a joint stock company upon a judgment recorded against such company, or against a public officer or other person representing such company ;.

"The party alleging himself to be entitled to execution,

(1) *Kirkwood v. Lloyd*, 11 Ir. Eq. R. 561; on appeal, 12 Ir. Eq. R. 585; *In re Bodkin*, 12 Ir. Ch. R. 61; *contra*, *Martin v. McCausland*, 3 Ir. L. R. 113; *Murray v. Clarke*, 4 Ir. C. L. R. 610.

(2) *Ryan v. Cambie*, 2 Ir. Eq. R. 328; *Franks v. Mason*, 9 Ir. Eq. R. 358.

(3) R. S. C. Ir., 1891, O. XLII. rr. 24 & 25.

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may apply to the Court or a Judge for leave to issue execution accordingly. And such Court or Judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or Judge may impose such terms as to costs or otherwise as shall be just."

O'Brien, J., in the case of *Evans v. O'Donnell* (1), raised the question whether an order of this kind for leave to issue execution would have the effect that was ascribed to a revivor in *Farran v. Beresford* (2) by the House of Lords, so as to give to a plaintiff a new period from which the statute runs afresh. The learned judge expressed an opinion that the force of the Irish Judicature Act (which for this purpose is the same as the English one) would be held to deprive such an order of all efficacy as a means of making time run afresh.

Judgment
in action on
judgment.

The recovery of a judgment in an action of debt on the original judgment will not have the effect of extending the time for bringing any proceedings on the original judgment (3); but of course the new judgment creates a new judgment debt, and proceedings may be taken on it independently.

Legacies.

In the case of a legacy, apart from a deficiency of assets, which will presently be discussed, time begins to run from the moment at which the legacy becomes actually payable (4); this, in an ordinary case, where no time is fixed in the will, is twelve months after the testator's death (5). A legatee is ordinarily entitled to interest from the time when the legacy becomes

(1) 16 L. R. Ir. at p. 452.

(2) 10 C. & F. 319.

(3) *Watters v. Lidwill*, 9 Ir. L. R. 362.

(4) *Earle v. Bellingham* (No. 2), 24 Beav. 448; *Prior v. Horniblow* 2 Y. & C. Ex. 200.

(5) See Williams on Executors, 8th ed. 1393, and cases referred to.

payable (1); hence it frequently happens that the time from which interest is payable is identical with that from which the statute begins to run; but it appears to be erroneous to treat the fact of interest beginning to run as a test of the legatee having a present right to receive the legacy within the meaning of the statute (2). An executor cannot, it seems, be compelled to pay a legacy before the expiration of a year, even if so directed in the will (3); time will, therefore, it seems, in no case run before that period has elapsed, even where, as in the case of a legacy by a parent or in discharge of a debt, interest will be allowed from the testator's death (4). Where a legacy was so given that interest on it was payable to the legatee during his life, but it was doubtful whether the gift was absolute, except in the event of his death without issue, it was held that time did not run during his life, although he had a right during that time to compel the executors to pay the money into Court (5).

In the case of an annuity bequeathed by will a present right to receive can only arise as to each periodical payment at the time at which such payment becomes due, and hence it would seem that the time must be reckoned separately with regard to each payment. Wood, V.-C., in the case of *Ashwell's Will* (6), which arose under 3 & 4 Wm. IV. c. 27, s. 40, spoke of the entire annuity as one legacy, and the yearly payments as part payments of the principal of such legacy (7), and seems to have considered that if no payment were made for twenty

Bequest of
annuity.

(1) See Williams on Executors, 8th ed. 1430, *et seq.*, and cases referred to.

(2) *Earle v. Bellingham* (No. 2), 24 Beav. 450; but see *Hornsey Local Board v. Monarch Investment Building Society*, 24 Q. B. D. per Lindley, L.J. p. 10.

(3) See Williams on Executors, 8th ed. 1393, and cases referred to.

(4) See Williams on Executors, 8th ed. 1430, and cases referred to.

(5) *Lord v. Lord*, 3 Jur. N.S. 485.

(6) Johns. 112, 117.

(7) See *post*, Chapter IV.

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years, the annuity would be extinguished; but the question whether an annuity charged on land is extinguished will depend upon the 3rd section of 3 & 4 Wm. IV. c. 27 and the 2nd section of 37 & 38 Vict. c. 57; where, however, there is a bequest of an annuity payable out of personalty only, as in the case referred to, there is no more ground for holding it to be absolutely barred by non-payment for twenty years than in the case of an annuity secured by bond or covenant, and in fact twelve years' arrears of an annuity, given by will and payable out of personalty only, may be recovered at whatever time the suit is brought for the purpose (1).

Case of a
residuary
legatee.

On the question when time begins to run against a residuary legatee, in the case already mentioned of *Prior v. Horniblow* (2), Alderson, B., speaking in general terms, seemed to consider it as "the time when the residuary legatee is capable of ascertaining what is the clear residue and requiring payment of the amount;" this, it is submitted, is in ordinary cases at the end of the year after the testator's death (3). It is, however, obvious that a residuary legatee may have a right to require the payment to him of part of the assets at one time and part at another. If, for instance, a sum has been set apart to satisfy an annuity, the residuary legatee has no right to the sum until the annuity ceases, and, so long as the annuity lasts, time will not begin to run as against the right to obtain payment of that sum (4). Lord Romilly, M.R., in deciding this point, says: "In every case where a fund is set apart to satisfy an annuity, there is a trust of the fund set apart in favour of the residuary legatee, however long the annuity payable out of it may have lasted. If a sum of £1000

(1) *Roch v. Callen*, 6 Hare, 531. See *Dower v. Dower*, 15 L. R. Ir. 264.

(2) 2 Y. & C. Ex. 200, 206.

(3) But see *Hornsey Local Board v. Monarch Investment Building Society*, per Lindley, L.J., 24 Q. B. D. p. 10.

(4) *Bright v. Larcher*, 27 Beav. 130, 135.

Consols was set apart to satisfy an annuity of £30 a year, and the annuitant lived thirty or forty years, there can be no question but that the £1000 would on the death of the annuitant belong to the residuary legatee, it having been set apart for that particular purpose." It is submitted that Lord Romilly is inaccurate in speaking of a *trust* in favour of the residuary legatee, and that when a sum is set apart to satisfy an annuity which is simply given generally, the case is quite different from that of a sum bequeathed to the executors in trust to pay the dividends to one for life, and subject thereto upon trust for the residuary legatee, and is not within the principle of the decision in *Phillipo v. Munings* (1), and that the residuary legatee would under 3 & 4 Wm. IV. c. 27, s. 40, be barred twenty years, and now, under 37 & 38 Vict. c. 8, will be barred twelve years after the annuity ceases.

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The mere existence of an annuity for a long period cannot keep alive the right of a residuary legatee to a general account and administration of the testator's assets; this is a right which may clearly be distinguished from the right to recover particular assets. As against the general right to administration time runs from the end of the year after the testator's decease, but as against the right of the residuary legatee to assets in the executor's hands which are properly set apart for purposes taking effect in precedence of the right of the residuary legatee, time begins to run when such purposes fail, and not before, as till that time the residuary legatee cannot be said to have a present right to receive the assets in question (2).

General
right to
adminis-
tration.

As to the right of a residuary legatee to recover particular assets which have actually come into the executor's hands (as distinguished from a general right to adminis-

(1) 2 Myl. & C. 309. See *ante*, p. 171.

(2) See *In re Johnson. Sly v. Blake*, 29 Ch. D. 964. *In re Ludlam. Ludlam v. Ludlam*, 63 L. T. 330.

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tration), time does not begin to run against the residuary legatee till the assets have come into the executor's hands, however long a period may have elapsed since the testator's death; and a residuary legatee has similarly at any time a right to an inquiry whether any assets of the testator have come into the executor's hands within twelve years of the bringing of the action (1). In following the decisions which establish these points a distinction may be drawn between funds reversionary or contingent or of a like nature falling into the estate within the twelve years, on the one hand, and such funds, on the other hand, as the residuary legatee might have compelled the executor to get in before the expiration of that period; and the Court would be guided by the principle on which, without reference to any statutory limitation to the time of giving relief, it always refuses assistance to persons who have long slumbered on their rights or otherwise been guilty of acquiescence, a principle with which it is expressly declared by 3 & 4 Wm. IV. c. 27, s. 27, that Act is not to interfere

Legatee's
right to
compel
executor to
get in
assets.

A further question may be raised whether after the expiration of thirteen years from the testator's death the statute will bar the legatee's right to compel the executor to get in for the legatee's benefit assets coming into existence within twelve years from the bringing of the action. This point seems quite an open one; and as to reversions and contingent estates falling in, it is perhaps not very material, as in many cases the residuary legatee would be able to commence a suit against the parties in whose hands the funds were. If the testator were the obligee of a bond upon which a right of action did not accrue till upwards of thirteen years after the testator's death, the residuary legatee could not, it seems, get at

(1) *Adams v. Barry*, 2 Coll. 285. *Binns v. Nichols*, L. R. 2 Eq. 256; 35 L. J. Ch. 635; *Reed v. Fenn*, 35 L. J. Ch. 464. *In re Johnson*. *Sly v. Blake*, 29 Ch. D. 964. *In re Ludlam*. *Ludlam v. Ludlam*, 63 L. T. 330.

the money except by compelling the executor to sue and account for it. It would seem that in such a case the residuary legatee cannot properly be said to have a right to receive within the meaning of the Act until the bond debt becomes payable.

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The cases decided on the points above discussed with reference to residuary bequests may assist in the solution of similar questions arising with regard to general pecuniary legacies, as to which it is believed there is less authority. It must, however, be borne in mind that there is a difference between the right of a residuary legatee and that of a pecuniary legatee, since the former has, subject to the rights of creditors and legatees, a right to have every specific fund or property forming part of the estate transferred to him; whereas the latter has, subject to the rights of creditors and other legatees, a right when the legacy becomes payable to have the amount of his legacy raised and paid out of any funds forming part of the estate. From the above considerations it is submitted that the following observations are probably correct. Until there are assets applicable in due course of administration to the payment of a legacy, the legatee cannot be said to have a present right to receive it, although it may have become payable before (1); but if there have once been assets sufficient for the payment of the legacy, when the right of the legatee as against those assets is barred, it is also barred as against all other assets subsequently becoming applicable.

General
pecuniary
legacies.

By assets applicable for the payment of the legacy are meant not merely assets in the hands of the executors but assets which could be got in and so applied, for the legatee has a right to compel the executor to get in such assets and account for them. The only case bearing

Time will
not run till
there are
assets for
the pay-
ment of the
legacy.

(1) *Faulkner v. Daniel*, 3 Hare, 199, 212; see *Ravenscroft v. Frisby*, 1 Coll. 16, 23.

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on these points, besides the cases just referred to, is believed to be *Bright v. Larcher* (1). There the testator died in 1812; a sum was set apart by his executor to answer an annuity, and the annuitant died in 1856. Soon after the death of the annuitant an unpaid legatee claimed payment out of the fund. Romilly, M.R., declined to express an opinion whether, if it had been shewn that there were no assets previous to the cesser of the annuity, the legatee would have been barred or not, but laid down that the burden of proof that there were no such assets lay on the legatee, and that, as he had not furnished such proof, he was barred. The Master of the Rolls did not state very clearly what the period was during which the plaintiff must prove that there were no such assets, but it is submitted that now it would be sufficient if the plaintiff proved that there were no such assets till within twelve years of the bringing of the action. To apply the principles laid down above to the case of *Bright v. Larcher*, it is submitted that, if the legatee had proved that there were no other assets properly applicable to the payment of the legacy except the sum set apart, and that the annuity had priority over the legacy, the legatee would not have been barred; but if the annuity had no such priority, the legatee would have been barred, because, when the legacy became payable, he had a right to make the annuity abate in his favour and to receive part, the rest being retained to meet the annuity (2).

Legacy out
of a rever-
sionary
fund.

When a legacy is demonstrative and directed to be paid out of a reversionary fund, time does not begin to

(1) 27 Beav. 130; affirmed on appeal, 4 De G. & J. 608; 28 L. J. Ch. 837.

(2) *Rogers v. Millicent*, 2 Dickens, 570; *Wroughton v. Colquhoun*, 1 De G. & Sm. 357; *Carr v. Ingleby*, 1 De G. & Sm. 362; *Long v. Hughes*, 1 De G. & Sm. 364; *Ashburnham v. Ashburnham*, 16 Sim. 186. See *Wright v. Callender*, 2 De G. M. & G. 652; *Carmichael v. Gee*, 5 App. Cas. 588; *Todd v. Bielby*, 27 Beav. 353; *Potts v. Smith*, L. R. 8 Eq. 683.

run till the reversion falls in (1). Where the legacy is given generally, and the only assets applicable for payment are such reversionary or contingent funds as are before referred to, the question whether time will begin to run against the legatee till the funds fall in depends upon whether such interests, while remaining reversionary or contingent, are of actual value, and such as could properly, having regard to the interests of all parties, be turned into money and applied in payment of the legacy; if they are of such a nature, it cannot be said that there are no assets applicable for the satisfaction of the legacy (2). It would seem that, whenever the legatee's right to the payment of his legacy out of assets would not be barred, if the assets were actually in the hands of the executor, neither will his right be barred to compel the executor to get in such assets for his benefit.

Where the person entitled to receive a legacy is also the executor who is liable to pay it, the statute will not run so long as the two characters are united in the same person; and if after the statute has begun to run the same union of characters takes place, the statute ceases to have any operation, the legacy being in the hands entitled to receive it (3).

Legacy payable to executor.

The principles with regard to time running between an executor and residuary legatee apply equally between an administrator and the next of kin (4), and also, therefore, necessarily between an executor and the next of kin with regard to residue undisposed of (5), if time runs at all in that case (6).

Case between next of kin and executor or administrator.

Where a sum of money was charged on land in favour of trustees upon trust for certain persons for life with

(1) *Earle v. Bellingham* (No. 2), 24 Beav. 448.

(2) *In re Blachford. Blachford v. Worsley*, 27 Ch. D. 676. *In re Johnson. Sly v. Blake*, 29 Ch. D. 964.

(3) *Binns v. Nichols*, L. R. 2 Eq. 256.

(4) *In re Johnson. Sly v. Blake*, 29 Ch. D. 964.

(5) See *Reed v. Fenn*, 35 L. J. Ch. 464.

(6) See p. 173.

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remainder over, and the trustees had no power to give receipts, time was held not to run against the remainderman until the death of the tenants for life, because there was no person capable of giving a discharge (1). But as trustees have now, by statute (2), the power of giving receipts which are a sufficient discharge of any person liable to pay, it would seem, therefore, that time must now, in such a case as that just referred to, run from the date at which the money became payable to the trustees. But if the trustees do not act, and no trustees are appointed in their place, the statute does not run against the persons entitled in remainder until the determination of the life interest (3). The words of sect. 40 of 3 & 4 Wm. IV. c. 27 (now sect. 8 of 37 & 38 Vict. c. 57), if taken alone, would prevent the time running in the case of any sums becoming payable to the estate of an intestate in the interval between his death and the grant of administration until such administration was taken out. The 6th section of 3 & 4 Wm. IV. c. 27, as will be hereafter seen, expressly provides that an administrator claiming the estate or interest of a deceased person shall be deemed to claim as if no interval had elapsed between the death and the grant of administration, and it has been held by Stirling, J., that the 6th section of 3 & 4 Wm. IV. c. 27 applies for all the purposes of the Act (4).

Expenses
incurred
by local
authority
made a
charge on
the pre-
mises.

Where a local authority had incurred expenses which, by virtue of sect. 62 of the Local Government Act, 1858 (5) (corresponding to sect. 257 of the Public Health Act, 1875 (6)), were made a charge on the premises in respect of which they were incurred, it was held that the expenses became a charge on the premises upon completion of the

(1) *McCarthy v. Daunt*, 11 Ir. Eq. R. 29. See *Carroll v. Hargrave*, 5 Ir. R. Eq. 123.

(2) 44 & 45 Vict. c. 41, s. 36.

(3) *Carroll v. Hargrave*, 5 Ir. R. Eq. 123.

(4) *In re Williams. Davies v. Williams*, 34 Ch. D. 558. See ch. VII.

(5) 21 & 22 Vict. c. 98.

(6) 38 & 39 Vict. c. 55.

works, and that, under sect. 8 of 37 & 38 Vict. c. 57, time ran against the local authority from that date, and not from the date of the apportionment of the expenses among the frontagers, although the sum for which the charge was imposed was not ascertained till the latter event (1). In that case the Court of Appeal held that the words "present right to receive" in sect. 8 of 37 & 38 Vict. c. 57 are not equivalent to "present right to enforce payment of," and that the words, "capable of giving a discharge," referred to cases of disabilities and not to a case where the sum in respect of which the charge is imposed is not ascertained. The argument which seems to have weighed most with the Court in coming to this conclusion was that, as no time was limited for making the apportionment, the local authority by delay in making the apportionment might delay the application of the Statute of Limitations for any time they pleased.

(1) *Hornsey Local Board v. Monarch Investment Building Society*, 24 Q. B. D. 1.

CHAPTER III.

DISABILITIES.

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There must
be a person
capable of
giving a
discharge.

THE existence of a person capable of giving a discharge is a condition precedent to the time beginning to run, and this person is to be the person to whom the right to receive accrues.

Although there is no exception in favour of disabilities in cases falling within the 40th section of 3 & 4 Wm. IV. c. 27 or the 8th section of 37 & 38 Vict. c. 57, yet certain disabilities are practically provided for by the condition above referred to. If the person entitled to the money be an infant or *non compos*, he is clearly incapable of giving a discharge (1); no allowance was made for coverture, because under the old law the husband would have a right to receive; now in all cases where the husband has not a right to receive, the wife has the right by virtue of the Married Women's Property Act, 1882 (2), and is capable of giving a discharge.

In cases where the guardian or committee of an infant or lunatic can give a receipt for the money, it might be said that there is a person capable of giving a discharge, and, therefore, that the infant or lunatic in such cases would not be protected. But this view, it is submitted, is incorrect, because, though the guardians or committee may prosecute, on behalf of and in the name of the infant

(1) See *Piggott v. Jefferson*, 12 Sim. 26; and Sugden's Property Statutes, 129.

(2) 45 & 46 Vict. c. 75, s. 1.

or lunatic, an action to recover money the right to receive which has accrued to the infant or lunatic, and may generally act and give a receipt for the money on his behalf, yet the right to receive cannot be said to accrue to the guardian or committee himself.

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It is obvious from the mode in which the section operates to provide for disabilities in the case of infants and *non compotes* that a succession of such disabilities in the same or successive persons must prevent the time beginning to run.

Successive disabilities.

Where money is payable to several persons jointly, and one or more of them is under any such disability as before mentioned, then, if from the fact of such persons being partners or executors or from any other cause, a discharge can be given without the concurrence of the persons under disability, time, it seems, would run as against all, but otherwise it would not run as against any until all are free from disability; and the rule just laid down as to successive disabilities would in this case extend to successive disabilities affecting the different persons to whom the money is jointly payable.

Money payable to several jointly.

Though the Mercantile Law Amendment Act (1), s. 10, refers to the 40th section of 3 & 4 Wm. IV. c. 27, it is obvious that no allowance is made in 3 & 4 Wm. IV. c. 27, s. 40, or 37 & 38 Vict. c. 57, s. 8, for the absence beyond seas either of the persons entitled to the money, or of those by whom the money is payable; and the various points which have arisen with reference to the absence of defendants on 4 Anne, c. 16, s. 19, and 3 & 4 Wm. IV. c. 42, s. 4, cannot arise here.

Absence beyond seas.

In the case of *Boldero v. Halpin, Ex parte Hawes* (2), a legacy had been bequeathed to the claimant, who was an infant at the time of the testator's death. When the

Lunacy of person liable to pay.

(1) 19 & 20 Vict. c. 97.

(2) 19 W. R. 320. See *Brockwell v. Bullock*, 22 Q. B. D. 567, and *post*, Part IV. Ch. I.

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infant came of age, the surviving executrix was of unsound mind, and so remained till her death, more than twenty-three years after the infant came of age. The legatee sent in a claim for his legacy in a suit for the administration of the estate of the surviving executrix. It was held that the legatee's claim was barred.

CHAPTER IV.

LIMITATION OF RIGHT TO RECOVER ARREARS OF RENT
AND INTEREST ON MONEY CHARGED ON LAND.

SECTION 40 of 3 & 4 Wm. IV. c. 27 (now sect. 8 of 37 & 38 Vict. c. 57) provides a limitation for the recovery of principal monies, but a different period of limitation is in many cases fixed for the recovery of interest. The most important provision on this point is contained in 3 & 4 Wm. IV. c. 27, s. 42. The first part of that section is as follows:—

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—
3 & 4 Wm.
IV. c. 27,
s. 42.

“No arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest shall be recovered by any distress, action or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto or his agent, signed by the person by whom the same was payable or his agent.”

“Arrears of rent” means arrears of rent of every kind comprised in the definition given in sect. 1 of 3 & 4 Wm. IV. c. 27, including rent as an incorporeal hereditament (1), as well as rent reserved, and includes a gross Rent.

(1) *Strachan v. Thomas*, 12 A. & E. 536, 558; *Hunter v. Nockolds*, 1 McN. & G. 640; 19 L. J. Ch. 177; *Humfrey v. Gery*, 7 C. B. 567; *James v. Salter*, 3 Bingh. N. C. 544; *Irish Land Commission v. Grant*, 10 App. Cas. 14.

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Annuity.

sum of money charged on land and payable by periodical instalments (1).

An annuity given by will is not interest on a legacy, but if charged on land is within this section as included in the word "rent" (2). Arrears, therefore, of a personal annuity given by will, not being within this section, are governed wholly by the 40th section of 3 & 4 Wm. IV. c. 27 or the 8th section of 37 & 38 Vict. c. 57 (3), and twenty years' arrears would be recoverable under the former and twelve under the latter statute. Where an annuity is given by will and is a charge both on the testator's realty and personalty, sect. 42 of 3 & 4 Wm. IV. c. 27, will limit the arrears to be recovered to six years, whether recoverable out of the land or out of the personal estate (4).

Money
charged on
land or
rent.

The general words, "money charged upon or payable out of any land or rent," are to be read exactly as if the cases of mortgage, judgment and lien had been enumerated as in sect. 40 of 3 & 4 Wm. IV. c. 27 (5); and it has been decided that a mortgage of a reversionary interest in the proceeds of the sale of land devised upon an absolute trust for conversion, is a mortgage of "a sum of money charged upon or payable out of land" within the meaning of the 42nd section, and, accordingly, that only six years' arrears of interest on such mortgage were recoverable (6).

A mortgage of a reversionary interest in a sum of money representing the residuary personal estate of a testatrix, which was invested on mortgage of real estate by the testatrix, and so continued by her executors, is not a mortgage of a "sum of money charged upon or pay-

(1) *Uppington v. Tarrant*, 12 Ir. Ch. R. 262.

(2) *Roch v. Callen*, 6 Hare, 531; *Francis v. Grover*, 5 Hare, 39; *Ferguson v. Livingston*, 9 Ir. Eq. R. 202. *In re Ashwell's Will*, Johns. 112. *In re Nugent's Trusts*, 19 L. R. Ir. 140.

(3) See Part III. Ch. II. p. 182.

(4) *In re Nugent's Trusts*, 19 L. R. Ir. 140.

(5) *Henry v. Smith*, 4 Ir. Eq. R. 502; 2 D. & War. 381.

(6) *Bowyer v. Woodman*, L. R. 3 Eq. 313. See *In re Slater's Trusts*, 11 Ch. D. 227.

able out of land," and neither sect. 42 of 3 & 4 Wm. IV. c. 27, nor any section of any Statute of Limitation applies to arrears of interest in such a case accruing due while the interest is still reversionary (1).

As the 42nd section includes the recovery of arrears by any "action or suit," and not only an action or suit for the recovery of such arrears, it must apply to a foreclosure action (2). It also applies to proceedings by petition for payment of money out of court (3).

In the case of judgment debts, no more than six years' arrears of interest can be recovered, whatever be the form of remedy adopted, and this, whether the interest is directly secured by the judgment or given by statute (4). In Ireland, however, since the Irish Common Law Procedure Act, 1853, the law as to actions on judgments is somewhat altered (5). It seems clear that the 42nd section of 3 & 4 Wm. IV. c. 27 must also include all actions for arrears of rent reserved without specialty, which were included in the statute of 21 Jac. I. c. 16, as well as actions for use and occupation, which, though within the statute of James, are clearly within the words of this section; all proceedings to recover the interest of any money charged upon land, but not secured by specialty, would also fall within the 42nd section.

The proper rule in dealing with cases that come within this section, and also within sect. 3 of 21 Jac. I. c. 16, seems to be to give effect to both limitations; the result of which will be, that whichever enactment is the most stringent as respects the point in question will prevail.

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Fore-
closure.

Petition for
payment of
money out
of court.

Interest on
judgment
debts.

Actions for
rent re-
served
without
specialty.

Actions
within
both s. 42
of 3 & 4
Wm. IV. c.
27 & s. 3 of
21 Jac. I.,
c. 16.

(1) *Smith v. Hill*, 9 Ch. D. 143.

(2) *Sinclair v. Jackson*, 17 Beav. 405; see *Thwaites v. McDonough*, 2 Ir. Eq. R. 97.

(3) *In re Slater's Trusts*, 11 Ch. D. 227. *In re Stead's Mortgaged Estates*, 2 Ch. D. 713. *In re Marshfield. Marshfield v. Hutchings*, 34 Ch. D. 721. But see *Edmunds v. Waugh*, L. R. 1 Eq. 418.

(4) 1 & 2 Vict. c. 110, s. 17 (England); 3 & 4 Vict. c. 105, s. 26 (Ireland); *O'Kelly v. Bodkin*, 3 Ir. Eq. R. 390; *Henry v. Smith*, 4 Ir. Eq. R. 502; 2 D. & War. 381.

(5) See *post*, p 203.

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Thus, in most cases, the time limited by 21 Jac. I. c. 16, s. 3, and the present section being the same, no difficulty can arise; but as this section makes no allowance for disabilities, no allowance can be made for them in any case falling within it.

Interest on
purchase-
money.

In a suit to enforce a vendor's lien for unpaid purchase-money, where it was decided that under the circumstances the money had never become payable, and no provision had been made in the contract for payment of interest in the meanwhile, so that there was no right to recover it before the principal money could be recovered, it was held that the interest ran from the time when the purchase would have been completed according to the terms of the contract, though it was not due within the meaning of sect. 42 of 3 & 4 Wm. IV. c. 27, until the principal money actually became payable, and, therefore, the whole of the arrears remained a charge on the land (1). A question had been raised in this suit as to the right to the principal money being kept alive by an acknowledgment; but, as will be seen from the judgment of Turner, L.J., the decision was based on totally different grounds; and though at first sight Knight Bruce, L.J., might seem to have been of opinion that the right to interest as well as principal was preserved by the acknowledgment, this was, it is apprehended, not his real meaning, for the acknowledgment was more than six years old, and could not, therefore, affect the recovery of the interest.

Arrears of
money
charged on
a reversion.

Although the property on which the money is charged is reversionary, the 42nd section prevents the recovery of more than six years' arrears accruing due before the reversion falls into possession. Lord St. Leonards, when Lord Chancellor of Ireland, held in the case of a judgment, that the fact of the interest charged being reversionary made no difference (2), and Romilly, M.R., held

(1) *Toft v. Stevenson*, 5 De G. M. & G. 735.

(2) *Vincent v. Goinq*, 7 Ir. Eq. R. 463; 1 Jon. & Lat. 697.

the same in the case of a mortgage (1). Hall, V.-C., expressed his concurrence with these decisions (2), and the decision *contra* of Wood, V.-C., in *Wheeler v. Howell* (3), cannot be considered law. The section, it will be noticed, is limited to charges upon land: where the reversionary interest charged is personalty, there is no limit to the arrears of interest which can be recovered, so long as the interest remains reversionary (4).

Cases within s. 42 of 3 & 4 Wm. IV. c. 27 and s. 3 of 3 & 4 Wm. IV. c. 42.

There are many cases which are included within the words of the 42nd section of 3 & 4 Wm. IV. c. 27, and also within the 3rd section of 3 & 4 Wm. IV., c. 42, the same sum being charged upon land, and also secured by specialty; and the difficulty of putting a proper construction on the two enactments was increased by the fact that both the statutes were passed in the same session of Parliament, and that 3 & 4 Wm. IV. c. 42, although passed after 3 & 4 Wm. IV. c. 27, came into operation before it; questions naturally arose how far either enactment was to be considered as repealing the other, and whether they related to different subject-matters or different remedies. The two sections first came into conflict in the case (5) of an action of covenant for rent due under an indenture of demise, and Tindal, C.J., and Park, J., were of opinion that such rent was not included at all in the 42nd section of 3 & 4 Wm. IV. c. 27; Bosanquet, J., on the contrary, held it was; Vaughan, J., expressed no opinion on the point; but all agreed that the case before them came under sect. 3 of 3 & 4 Wm. IV. c. 42; and if it was included in the former Act, was excepted out of it by the latter. This case was followed by that of *Strachan*

(1) *Sinclair v. Jackson*, 17 Beav. 405; and see *Humble v. Humble*, 24 Beav. 535, 539.

(2) *Smith v. Hill*, 9 Ch. D. 143.

(3) 3 K. & J. 198.

(4) *Smith v. Hill*, 9 Ch. D. 143; *Mellersh v. Brown*, 45 Ch. D. 225; *Clarkson v. Henderson*, 14 Ch. D. 348.

(5) *Paget v. Foley*, 2 Bingh. N. C. 679; 3 Scott, 120; see *Hartshorne v. Watson*, 4 Bingh. N. C. 178.

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charged on
land.

v. *Thomas* (1), where, in an action of debt on a covenant to secure an annuity which was also charged on land, it was held that twenty years' arrears could be recovered, on the ground that though the case was included in the words of the 42nd section of 3 & 4 Wm. IV. c. 27, it also fell within the 3rd section of 3 & 4 Wm. IV. c. 42, and was, therefore, excepted out of the former section (2). Both of these cases were actions upon the covenant, and not proceedings to recover the money out of the land upon which it was charged, and the decisions did not necessarily go farther than to hold that sect. 3 of 3 & 4 Wm. IV. c. 42 was so far an exception out of sect. 42 of 3 & 4 Wm. IV. c. 27, as to prevent the latter section being pleaded to an action on the specialty; and in *Strachan v. Thomas* (3) the judges appear to have thought that if the action had not been brought on the specialty, the limitation fixed by 3 & 4 Wm. IV. c. 27, s. 42 would have prevailed (4).

Du Vigier
v. Lee.

It soon, however, became necessary to decide this point, for in *Du Vigier v. Lee* (5), which was a foreclosure suit, where the mortgage debt and interest were secured by covenant, the question was raised whether twenty or only six years' arrears of interest could be recovered. Now these arrears were clearly arrears of interest of money charged upon land, and were *primâ facie* within the provisions of 3 & 4 Wm. IV. c. 27, s. 42, so that the proceeding by which they were sought to be recovered, not being grounded on the specialty, no more than six years' arrears could be recovered unless the effect of the covenant to pay was to withdraw the subject-matter altogether from the operation of that section. Vice-Chancellor Wigram, acknowledging and professing to

(1) 12 A. & E. 536, 558.

(2) See *Manning v. Phelps*, 10 Exch. 59; 24 L. J. Exch. 62.

(3) 12 A. & E. 536, 558.

(4) See *In re Nugent's Trusts*, 19 L. R. Ir. 140.

(5) 2 Hare, 326.

follow the authority of the two cases last cited, held that the fact of the mortgage containing a covenant for payment excepted the debt altogether out of the statute 3 & 4 Wm. IV. c. 27, s. 42, without reference to the mode of its recovery, and that redemption could only be allowed on payment of interest for twenty years. This decision, and a subsequent one to the like effect by the same judge, came under the consideration of Lord Cottenham, L.C., on appeal in the latter case (1), when the Lord Chancellor held, in opposition to the Vice-Chancellor, and in accordance with a case in Ireland which will be mentioned presently (2), that the combined effect of the two enactments was, that "no more than six years' arrears of rent or interest in respect of any sum charged upon or payable out of any land or rent could be recovered by any distress, action, or suit other than and except in actions upon covenants or debts upon specialty, in which case the limitation would be twenty years." The authority of *Hunter v. Nockolds* was directly recognised in *Sinclair v. Jackson* (3), but may be thought, from expressions attributed to Wood, V.-C., and to Knight Bruce, L.J., in the reports of *Snow v. Booth* (4), to be shaken both by that case and the previous case of *Cox v. Dolman* (5). The question, however, in each of those cases was, whether a term vested in trustees as a further security for an annuity, would take the case out of the provisions of 3 & 4 Wm. IV. c. 27, s. 42 (6); and as it was held to do so, it was unnecessary to consider the effect of sect. 3 of 3 & 4 Wm. IV. c. 42. In *Hunter v. Nockolds* a similar term had been created to secure the annuity which formed the subject of dispute, but no question as

Hunter v.
Nockolds.

(1) *Hunter v. Nockolds*, 1 McN. & G. 640; 19 L. J. Ch. 177.

(2) *Hughes v. Kelly*, 5 Ir. Eq. R. 286; 3 Dru. & War. 482.

(3) 17 Beav. 405.

(4) 2 K. & J. 132; on appeal, 8 De G. M. & G. 69; 2 Jur. N.S. 244; 25 L. J. Ch. 417.

(5) 2 De G. M. & G. 592; 22 L. J. Ch. 427.

(6) See post, Part V. Ch. XIX.

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to its effect appears to have been raised in the case as reported, and the decision was given irrespective of the existence of the term. In several later cases (1), when similar questions arose to those decided in *Coæ v. Dolman* and *Hunter v. Nockolds*, the authority of both those cases was acknowledged. But since the Act 37 & 38 Vict. c. 57 came into operation, it has been held in the cases of *Sutton v. Sutton* (2) and *Fearnside v. Flint* (3), that by virtue of the 8th section of that Act, the remedy against the mortgagor on the covenant is barred at the same time as the remedy against the land. And it would seem to follow that only twelve years' arrears of interest are now recoverable in an action on a covenant against a mortgagor.

Where land is conveyed by a mortgage deed to the mortgagee to hold until the mortgage debt with interest should be repaid, but there is no covenant to pay the mortgage debt, the 3rd section of 3 & 4 Wm. IV. c. 42 cannot apply, and only six years' arrears of interest are recoverable (4).

Interest on
money se-
cured by
covenant.

Where the covenant to pay principal money charged on land does not in terms extend to the payment of interest, and such interest is only recoverable in an action on the covenant by way of damages, the 3rd section of 3 & 4 Wm. IV. c. 42, it seems, does not apply, and therefore, as far as the interest is concerned, such an action is governed by sect. 42 of 3 & 4 Wm. IV. c. 27 alone.

Humfrey
v. Gery.

In the case of *Humfrey v. Gery* (5), which was sent by the Court of Chancery for the opinion of the Court of Common Pleas on the question whether arrears of a fee

(1) *Shaw v. Johnson*, 1 D. & S. 412; 30 L. J. Ch. 646; *Lewis v. Duncombe*, 29 Beav. 175; 30 L. J. Ch. 732; *Round v. Bell*, 30 Beav. 121; 31 L. J. Ch. 127; *Darley v. Tennant*, 53 L. T. 257.

(2) 22 Ch. D. 511.

(3) 22 Ch. D. 579.

(4) *Hodges v. Croydon Canal Co.*, 3 Beav. 86.

(5) 7 C. B. 567.

farm rent reserved by letters patent could be recovered more than six years after they accrued, and if so, whether by distress or action, the Court of Common Pleas certified that arrears for more than six years could not be recovered. A question was raised in the argument whether an action of debt would lie; and if the judges intended to decide that only six years' arrears were recoverable in such an action, it is submitted that this decision must be wrong, for such an action would be an action of debt on a specialty within 3 & 4 Wm. IV. c. 42, s. 3. It is probable, therefore, that the real meaning of the certificate was, that no such action would lie; in which case, distress being the only mode of recovering the rent, of course no more than six years' arrears could be recovered.

Several Irish cases upon the 42nd section of 3 & 4 Wm. IV. c. 27 have been already referred to, but owing to the differences which for some time existed between the law in England and Ireland (1), it has been thought better to give them a separate notice, and it will be seen that the Irish decisions fully corroborate the view ultimately taken by the English judges. There seems, however, to have been at first some doubt in the minds of the Irish judges whether the fact of 3 & 4 Wm. IV. c. 42 having been passed in England, was not to be taken into account as indicative of what was intended to be within sect. 42 of 3 & 4 Wm. IV. c. 27 (2); but ultimately the decisions were to the effect that any sum included within the last-named section as being rent (3) or interest of money charged on land (4), was not the less within its provisions, because it was also secured by specialty, and

The law in
Ireland on
the above
points.

(1) See *ante*, p. 143.

(2) *Armstrong v. Lloyd*, 2 Ir. L. R. 70; see *McKiernan v. Halliday*, 3 Ir. L. Rec. N.S. 58.

(3) *McKiernan v. Halliday*, 3 Ir. L. Rec. N.S. 58; *Wilson v. Jackson*, 2 Ir. L. R. 1; 1 Jebb & S. 639.

(4) *Foley v. Dumas*, 1 Smythe, 78; *Thwaites v. McDonough*, 2 Ir. Eq. R. 97.

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that the section equally applied to all remedies whether against the land or not (1); thus agreeing with the interpretation put upon it by Bosanquet, J., in *Paget v. Foley*, and by all the judges in *Strachan v. Thomas*, although, of course, the decision arrived at in both of these latter cases was different from that arrived at in Ireland, in consequence of the effect in England of 3 & 4 Wm. IV. c. 42, s. 3.

*Henry v.
Smith.*

The view that if a sum of money is subject-matter of 3 & 4 Wm. IV. c. 27, s. 42, that section applies to every remedy for its recovery, is forcibly put by Lord St. Leonards in the case of *Henry v. Smith* (2). His lordship in that case observed: "When the Act of Parliament says no action shall be maintained after a given number of years for the recovery of such a sum or such interest—how can a man after that period bring any action in respect of the debt? If an action is brought so as to charge the personal estate, the answer is obvious: You have brought your action in respect of a sum of money charged upon the land or payable out of real estate. You are, therefore, within the terms of this Act, and your right is barred." *Henry v. Smith* was decided after the passing of Pigot's Act (3), but the 32nd section of that Act was not referred to, and in fact had no bearing on the case. Not long after the passing of Pigot's Act, and just before *Du Vigier v. Lee* (4), the question arose before the same learned judge in *Hughes v. Kelly* (5), how many years' arrears of interest could be recovered in a foreclosure suit, there being a covenant to pay in the mortgage deed, and he decided on the same principle as Cottenham, L.C., subsequently did in

*Hughes v.
Kelly.*

(1) *Bruen v. Nowlan*, 1 Jebb & S. 346, n.; *O'Kelly v. Bodkin*, 3 Ir. Eq. R. 390; and see *Henry v. Smith*, 4 Ir. Eq. R. 502; 2 D. & War. 381.

(2) 4 Ir. Eq. R. 502; 2 Dru. & War. 381.

(3) 3 & 4 Vict. c. 105.

(4) 2 Hare, 326.

(5) 3 Dru. & War. 482; 5 Ir. Eq. R. 286.

Hunter v. Nockolds (1), that sect. 42 of 3 & 4 Wm. IV. c. 27 was not repealed, that both 3 & 4 Wm. IV. c. 27 and Pigot's Act ought to be construed together, and therefore that only six years' arrears could be recovered. The authority of *Hughes v. Kelly* was relied on by Lord Cottenham in *Hunter v. Nockolds* (2), and Lord St. Leonards, in his work on the Real Property Statutes (3), expresses the opinion that there is no distinction between the effect of the statutes in the two countries, and that the case of *Hunter v. Nockolds* sets the point at rest; the right mode to reconcile the provisions of the statutes being to consider 3 & 4 Wm. IV. c. 27, s. 42 as applicable to the land, and 3 & 4 Wm. IV. c. 42, s. 3 as applicable only to the person.

The 32nd section of Pigot's Act has been repealed, and the 20th section of the Irish Common Law Procedure Act, 1853 (4), substituted for it, so far as relates to actions in the Superior Courts in Ireland; but it would seem that the later enactment is to be construed as an exception out of the 42nd section of 3 & 4 Wm. IV. c. 27, in the same way as the 32nd section of Pigot's Act. The 8th section of 37 & 38 Vict. c. 57 applies to Ireland, and must affect so much of the 20th section of the Irish Common Law Procedure Act, 1853, as refers to judgments. Indeed, Barry, L.J., in a recent Irish case (5), seems to have been of opinion that the 8th section of 37 & 38 Vict. c. 57 impliedly repeals the 20th section of the Irish Common Law Procedure Act, 1853, so far as it concerns judgments; but the judgments of the other members of the Court of Appeal in that case treat the 20th section of the Act of 1853 as still in force. The effect of the two enactments would seem to be that in

(1) 1 McN. & G. 640.

(2) See also *Harrison v. Duignan*, 2 Dru. & War. 295; S. C. 4 Ir. Eq. R. 562; sub nom. *Kyme v. Dignan*.

(3) Page 148.

(4) 16 & 17 Vict. c. 113.

(5) *Evans v. O'Donnell*, 18 L. R. Ir. 174.

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Ireland twelve years' arrears can be recovered in an action in the Superior Courts on a judgment where the interest is secured by it, though not, it is apprehended, where the judgment carries interest by statute only (1).

In a recent case in Ireland (2) it was held that an action for rent due under a covenant in an indenture of demise, may be brought within twenty years of the accrual of the cause of action, and that neither sect. 1 nor sect. 8 of 37 & 38 Vict. c. 57, applies to such an action, which is governed by sect. 20 of the Irish Common Law Procedure Act, 1853, and that as far as relates to such an action the 20th section of the Act of 1853 is not affected by 37 & 38 Vict. c. 57.

Arrears of
interest in
redemption
suits.

A further question arises whether a mortgagor of land in a redemption suit is entitled to redeem on payment of six years' arrears of interest only. The point, it is believed, has never been distinctly raised. In *Du Vigier v. Lee* (3), however, Wigram, V.-C., laid down that, if the mortgagee could recover only six years' arrears of interest in a foreclosure suit, it would follow that the mortgagor would have a right in a redemption suit to redeem on payment of the same amount; and in a redemption suit (4) instituted by the heirs of the mortgagor, although it was decided that the plaintiff could not redeem without payment of twenty years' arrears, yet the decision was on the ground that the mortgagee had a right to tack the sum due on the covenant, as against the heirs of the mortgagor; and it seems to have been assumed, that except on that ground, the mortgagee had no claim to be paid more than six years' arrears. In *Sinclair v. Jackson* (5), which was a foreclosure suit, Romilly, M.R., suggested that the rights of a mortgagor

(1) 3 & 4 Vict. c. 105, s. 26. See *ante*, p. 195.

(2) *Donegan v. Neill*, 16 L. R. Ir. 309.

(3) 2 Hare, 326, 335.

(4) *Elvy v. Norwood*, 5 De G. & Sm. 240. See *post*, p. 210.

(5) 17 Beav. 405. See *post*, p. 211.

in a redemption suit might be different from his rights in a foreclosure suit; but in that case, too, the question actually raised was, that of tacking, and the same judge subsequently, in *Mason v. Broadbent* (1), treated it as a principle not admitting of doubt that a mortgagor could redeem in a redemption suit on payment of six years' arrears only. Kindersley, V.-C., however, expressed a strong dissent from that opinion (2). But Kay, J., in deciding that a mortgagor of a reversionary interest in personalty, was entitled to fourteen years' arrears on the ground that no Statute of Limitation applied, seems to have been of the opinion that if 3 & 4 Wm. IV. c. 27, s. 42 had applied, then the mortgagor might have been entitled to redeem on payment of six years' arrears only (3). The broad argument in favour of a mortgagor being allowed to redeem in a redemption suit on payment of only six years' arrears seems to be that the terms of redemption are the same, whether the redemption be decreed in a foreclosure suit or redemption suit, and that it makes no difference on which side of the record the mortgagor and the mortgagee may be. The argument on the other side seems to be that the 42nd section of 3 & 4 Wm. IV. c. 27 does not extinguish the arrears, and does not apply to a redemption suit, because it speaks only of the recovery of arrears by "any action or suit," and, therefore, can only apply to proceedings in which the party entitled to arrears is seeking relief, and that the Court, not being bound by the statute, as it is in a foreclosure suit, will not give the equitable relief sought in a redemption suit, unless the plaintiff on his part does complete equity by paying all arrears. These latter arguments are, no doubt, sound and correct in themselves, but still they do not prevent the application of the general principle on which the

(1) 33 Beav. 296.

(2) *Edmunds v. Waugh*, L. R. 1 Eq. 418, 421.

(3) *Mellersh v. Brown*, 45 Ch. D. 225.

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argument on the other side is founded. It is true that as doubts have been expressed, whether the right of a mortgagee in a redemption suit to tack a bond debt to his mortgage debt against the heirs of a mortgagor extended to a foreclosure suit (1), it has been considered unsettled whether the terms of redemption in a foreclosure suit and in a redemption suit are necessarily the same; but these doubts seem to be unfounded (2), and in a case (3) on which no question as to the statute arose, Wigram, V.-C., expressed a strong opinion to the same effect as in *Du Vigier v. Lee* (4) in the following words: "It has always appeared to me that the terms on which a mortgagor or those claiming through him, are entitled to redeem, must be the same, whether they are to be ascertained in a suit for redemption or foreclosure. It is truly said that a plaintiff seeking equity must do equity; but in determining what is equity, the question is, what are the duties or the liabilities which his situation at the time of instituting the suit imposes, and not whether he is plaintiff or defendant on the record."

Moreover, by the settled practice of the Court, where a second mortgagee files a bill to redeem against the first, it is necessarily a foreclosure suit against the mortgagor, and when subsequent incumbrancers are parties to such a suit, it becomes in effect a foreclosure suit between co-defendants (5), and this, as well as the ordinary form of redemption and foreclosure decrees, points to the conclusion that the right to redeem is, in fact, the same whatever may be the form of the suit (6). Besides, if the terms of redemption in redemption and foreclosure are to be different, it would follow that the

(1) See Powell on Mortgages, 6th ed. 1017*a*, *et seq.*

(2) See *post*, p. 211.

(3) *Sober v. Kemp*, 6 Hare, 155, 160.

(4) 2 Hare, 326.

(5) Daniell's Chanc. Pr. 6th ed. 217, 256. Seton on Decrees, 4th ed. II. 1052, 1089; 5th ed. 1641, 1645.

(6) See *Mellersh v. Brown*, 45 Ch. D. 225.

accounts between different incumbrancers would have to be taken on different principles in the same suit. Again, if more than six years' arrears can be recovered in a redemption suit, there is no reason why the arrears should be limited to twenty years rather than to six years, for 3 & 4 Wm. IV. c. 42, s. 3 does not extinguish arrears beyond twenty years; and if the Court is not bound by 3 & 4 Wm. IV. c. 27, s. 42 in redemption suits, neither is it bound by 3 & 4 Wm. IV. c. 42, s. 3; and where a redemption suit is brought by a second mortgagee, as he is not bound by the covenant, the limitation of twenty years can have no application to him, so that it would seem to follow that, unless the amount of arrears payable as the price of redemption in a redemption suit be limited to six years, a puisne mortgagee, at any rate, would have to pay all arrears whatever, without any limitation at all, and this would certainly be a strange result. On the whole, although it is a question of great difficulty, it is submitted that a mortgagor of land is entitled to redeem on payment of six years' arrears only (1). A mortgagor of personalty, it would seem, can only redeem on payment of all the arrears due (2).

In ejectment by a mortgagee against a mortgagor, the Court has under the 219th and 220th sections of the Common Law Procedure Act, 1852 (3), power to stay proceedings and compel the reconveyance of the mortgaged lands to the mortgagor upon payment into court of "all the principal moneys and interest due" upon the mortgage and of costs. It would seem that in such cases the arrears of interest required to be paid will be the same as those required to be paid in equity in a redemption suit.

Arrears of interest payable in staying ejectment by mortgagee.

In accounts between a mortgagor and mortgagee in

Account between mortgagor and mortgagee in possession.

(1) See Coote on Mortgage, 5th ed. II. 981.

(2) *Smith v. Hill*, 9 Ch. D. 143; *Clarkson v. Henderson*, 14 Ch. D. 348; *Mellersh v. Brown*, 45 Ch. D. 225.

(3) 15 & 16 Vict. c. 76.

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possession the mortgagee seems bound to account for all rents and profits received during his possession, however long that may be (1), so that all interest accrued due during that time would have to be brought into account; but if, on deducting the rents and profits from the interest due, more than six years' arrears of interest appear unsatisfied, only six years' arrears would be treated as due, whether in redemption or foreclosure suits.

In an action of the nature of an equitable ejectment against the mortgagee of a life estate who had entered into possession under an order of the Court, and remained in possession after the death of the tenant for life, it was held that the remaindermen were only entitled to six years' arrears of rent from the mortgagee (2).

Arrears of
interest re-
coverable
under
power of
sale.

Another question has arisen, viz.:—whether a mortgagee with a power of sale is entitled to retain out of the proceeds of such sale more than six years' arrears. Romilly, M.R., in a suit by the mortgagor to recover the surplus money, held that the mortgagee could only retain six years of interest (3); but that decision was questioned by Kindersley, V.-C., in a case (4) which has since been followed by Kay, J. (5), in preference to *Mason v. Broadbent*, and it seems clear now that a mortgagee has a right, if he exercises his power of sale, to retain more than six years' arrears of interest. In *Edmunds v. Waugh* (4), the proceeds of the sale of the mortgaged premises sold under the power of sale had been paid into court in a suit for the administration of the mortgagee's estate, and the trustees of the mortgagee petitioned for payment out of the fund to satisfy the principal, and nearly twenty years' arrears of interest, and the assignee of the mortgagor was served with the petition; Kindersley, V.C.,

(1) *Hood v. Easton*, 2 Jur. N.S. 729.

(2) *Hickman v. Ipsall*, 4 Ch. D. 144.

(3) *Mason v. Broadbent*, 33 Beav. 296.

(4) *Edmunds v. Waugh*, L. R. 1 Eq. 418.

(5) *In re Marshfield. Marshfield v. Hutchings*, 34 Ch. D. 721.

in deciding in favour of the petitioner that more than six years' arrears of interest could be retained, held that the proceeding was not a suit to recover interest under 3 & 4 Wm. IV. c. 27, s. 42, because had the money remained in the hands of the mortgagee and not been paid into court, he could have retained out of it the principal and all the interest due. In the case of *In re Marshfield, Marshfield v. Hutchings* (1), in which Kay, J., followed the decision in *Edmunds v. Waugh*, the proceeds of the sale were not in court, and the mortgagees who had sold the property and received the proceeds were not parties to the action, but submitted to the jurisdiction in order to have the point decided whether they were entitled or not to retain more than six years' arrears of interest; Kay, J., decided that they were. The case of *Edmunds v. Waugh* was distinguished but not disapproved by Malins, V.-C., in a case (2) where an equitable mortgagee petitioned for payment of principal and interest out of a fund which had been paid into court under the Lands Clauses Act (3), for purchase of the mortgaged land; Malins, V.-C., held that the money in court must be regarded as land, and that the petition was analogous to a suit for the recovery of interest under 3 & 4 Wm. IV. c. 27, s. 42, and that only six years' arrears could be recovered. The effect of these cases seems to be that where the mortgagee has to resort to an action or some analogous proceeding in court, such as a petition, in order to recover interest out of the proceeds of the mortgaged property, he can only recover six years' arrears; but if the mortgagee himself sells, he is entitled to retain all the arrears due, and the fact that after the sale the money is paid into court, and that it becomes necessary for the mortgagee or his representatives to petition for payment out of it, does not constitute the petition a suit to

(1) 34 Ch. D. 721.

(2) *In re Stead's Mortgaged Estates*, 2 Ch. D. 713.

(3) 8 & 9 Vict. c. 18.

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Tacking
arrears of
interest.

recover interest within the meaning of 3 & 4 Wm. IV. c. 27, s. 42.

It has been decided that where there is a covenant to pay the mortgage debt and interest in which the heirs of the mortgagor are bound, the mortgagee will in a redemption suit instituted by the heirs be permitted to tack to the principal and six years' interest, recoverable out of the land, the difference between the six and twenty years' arrears (1).

Now, a creditor on specialty in which the heirs of the mortgagor are bound can in equity reach the lands in the hands of the heir in satisfaction of his debt; therefore, it has long been the settled practice of the court, for the purpose of avoiding circuitry of suits, to allow a mortgagee in a redemption suit by the heirs of the mortgagor to tack such a separate specialty debt (2). A suit by the creditor to enforce payment of such a specialty debt against the lands of the debtor is a suit within the 3rd section of 3 & 4 Wm. IV. c. 42 (3), and therefore excepted out of the 42nd section of 3 & 4 Wm. IV. c. 27; for the fact of the interest being part of the mortgage debt cannot put the mortgagee in a worse position with regard to it than he would be in with regard to an independent specialty debt; and since 3 & 4 Wm. IV. c. 104, a debt secured by covenant, in which the heirs of the mortgagor are not bound, is, it seems, for the purpose of tacking to a mortgage debt, in the same position as if the heirs were bound (4).

The question whether arrears due more than six years can be so tacked in a foreclosure suit has been raised but

(1) *Elvy v. Norwood*, 5 De G. & Sm. 240; 21 L. J. Ch. 716. But see *In re Stead's Mortgaged Estates*, 2 Ch. D. at p. 718.

(2) See *Coleman v. Winch*, 1 P. W. 775; and Powell on Mortgages, 6th ed. 347a, et seq.

(3) *Roddam v. Morley*, 1 De G. & J. 1; 26 L. J. Ch. 438.

(4) See *Rolfe v. Chester*, 20 Beav. 610; *Thomas v. Thomas*, 22 Beav. 341; 25 L. J. Ch. 391.

not decided (1). But it is submitted that this question depends solely on whether a mortgagee can tack an independent specialty debt against the heir of a mortgagor in a foreclosure suit as well as in redemption suits. Now nearly all the cases of tacking have arisen either in redemption suits or administration suits; and it has certainly been considered doubtful whether it was allowable in foreclosure (2); however, in several cases of foreclosure the tacking was refused on other grounds, and not on the ground of the suits being foreclosure suits; both Mr. Coventry (3) and Mr. Coote (4) were of opinion that the distinction is untenable, and in a foreclosure suit (5), Romilly, M.R., decided that since 3 & 4 Wm. IV. c. 104, a mortgagee might tack a simple contract debt against the heirs of a mortgagor in such a suit, and it does not seem to have been then suggested by the learned judge or by counsel that the fact of its being a foreclosure suit and not a redemption suit affected the question. Having regard, therefore, to what has been before said as to the identity of the rights of the parties in foreclosure and in redemption suits, it is submitted that the principle of tacking specialty debts to mortgage debts against the heir of the mortgagor applies in foreclosure suits as well as in redemption suits, and that therefore, when there is a covenant to pay, a mortgagee can, in a foreclosure suit, tack against the heir of the mortgagor the difference between six and twenty years' arrears of interest.

In *Sinclair v. Jackson* (6), Romilly, M.R., declined to allow the tacking on the ground that the question was not raised by the bill, and that the amount of arrears beyond six years was for this purpose a distinct debt, and that as the decree merely directed the ordinary

Must the question of tacking be raised on the pleadings?

(1) *Sinclair v. Jackson*, 17 Beav. 405.

(2) See Powell on Mortgages, 6th ed. 1017*a*.

(3) See Powell on Mortgages, 6th ed. 1019*n* (*y*).

(4) Coote on Mortgages, 3rd ed. 393; 5th ed. 879.

(5) *Thomas v. Thomas*, 22 Beav. 341; 25 L. J. Ch. 391.

(6) 17 Beav. 405.

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account of principal and interest due on the mortgage, the question of tacking could not afterwards be raised; and this would seem to be right on principle.

It does not appear that a case for the tacking was made on the pleadings in *Elvy v. Norwood* (1), but it would seem that on the principle laid down in *Sinclair v. Jackson* the claim to the right of tacking should be set up by the defence in redemption actions; for if the judgment is merely for the usual accounts, it is hard to see how the question can afterwards be raised in a redemption action any more than in a foreclosure action, and the case of *Elvy v. Norwood* can hardly be taken as a decision to the contrary, as the question was by arrangement decided on a motion for injunction before the hearing. The right to tack the arrears of interest not directly recoverable out of the land would, of course, as in the case of tacking independent specialty debts, be without prejudice to mesne incumbrances (2).

It may be that the Court will carry the principle of avoiding circuitry of suits a step further than in the case of tacking, and allow a plaintiff in a suit in which six years' arrears only are recoverable to recover out of the land the difference between six and twenty years' arrears, not only where the plaintiff has himself another remedy against the land for such difference, but also where the plaintiff, though not entitled to recover more than six years' arrears directly against the land, can recover the difference against a third party personally, who in his turn can recover it over by way of indemnity against the land (3). It is not clear how far this doctrine will be carried, but it has been decided that it will not be allowed to prevail, unless the person entitled to go against the

(1) 5 De G. & Sm. 240; 21 L. J. Ch. 716.

(2) See *Lowthian v. Hasel*, 3 Br. C. C. 162; Fisher on Mortgages, 369; 4th ed. 573.

(3) *Harrisson v. Duignan*, 2 Dru. & War. 295; S. C. 4 Ir. Eq. R. 562, sub. nom. *Kyme v. Dignan*.

land by way of indemnity is himself a party to the suit, and is proved to be actually damnified by his personal liability (1); and it would seem too that if he be dead without assets, it will be held that there is no damnification, even though judgment be actually recovered against his personal representative in respect of his personal liability (2). In *Harrisson v. Duignan* (1), an owner of land had charged it with an annuity which he also covenanted to pay and he afterwards sold the land subject to the annuity. The parties entitled to the annuity filed a bill against the devisees of the purchaser to enforce payment of arrears, and though Sugden, L.C. of Ireland, would not allow the plaintiffs to recover more than six years' arrears in the absence of the vendor who was not a party, and afterwards in the other suit of *Byrne v. Duignan*, which was brought by his personal representative, declined on other grounds to enforce the indemnity against the land, yet it seems to have been assumed that the vendor or his estate had, on proper proof of being damnified, an equity to be indemnified out of the land against all liability on his covenant to pay the annuity. It is, however, submitted that though the vendor, so far as the annuity was recoverable out of land, would, if compelled to pay it under his covenant, have had a right to stand in the shoes of the annuitant, yet, so far as the annuity was not recoverable out of the land, his equity to be indemnified was only against the vendee personally, so that he could only, like any ordinary creditor against the vendee's estate, recover the amount of his claim out of the land as real assets in the hands of the devisees of the vendee (3).

A question may be raised whether the 8th section of 37 & 38 Vict. c. 57 does not apply in such cases so as

Effect of 37
& 38 Vict.
c. 57, s. 8,
on arrears.

(1) *Harrisson v. Duignan*, *ubi supra*.

(2) *Byrne v. Duignan*, 3 Jon. & Lat. 116; 9 Ir. Eq. R. 295.

(3) See *Willson v. Leonard*, 3 Beav. 373

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to limit the arrears recoverable to twelve years. It has been decided that that section prevents the recovery even by action on a covenant of money which is charged on land after the lapse of twelve years (1).

Arrears
payable for
relief from
forfeiture
for non-
payment of
rent.

A question, somewhat analogous to those discussed above, arises as to what amount of arrears a lessee will be required to pay to entitle himself to relief against forfeiture for non-payment of rent, or to have proceedings stayed in an action to enforce such forfeiture. It had been the practice from very early times to grant such relief, both at law and in equity, on payment of arrears and costs (2). It is believed there is no reported case in England on the point alluded to, and only one in Ireland (3), though O'Brien, J., in that case, said he recollected several cases in which proceedings had been stayed on payment of the six years' arrears.

The terms on which relief may be obtained in England at law in such a case are governed by the 212th section of the Common Law Procedure Act, 1852 (4), and the 1st section of the Common Law Procedure Act, 1860 (5). The first of these enactments is a repetition of 4 Geo. II. c. 28, ss. 23 & 24, and as it in term requires that the tenant should pay "all the rent and arrears," and there is no Statute of Limitations which directly applies to such a case, or which extinguishes the debt for arrears after any period, it seems pretty clear that relief cannot be granted under this statute on payment of six years' arrears only, where more are actually due, and the rent is reserved by an indenture under seal. It may be, however, that the words of the section can be interpreted to mean all arrears *recoverable*, and that therefore no more than twenty years'

(1) See *Sutton v. Sutton*, 22 Ch. D. 511.

(2) See 2 Platt on Leases, 475, 477.

(3) *Percival v. Dunne*, 9 Ir. C. L. R. 422.

(4) 15 & 16 Vict. c. 76.

(5) 23 & 24 Vict. c. 126.

arrears would be required to be paid, though more than that amount remained owing. The powers of relief given by the Common Law Procedure Act, 1860, are more extensive, and the terms on which relief under that Act may be granted are not necessarily the same, the relief obtainable under that statute being subject to the same terms and conditions in all respects as in Chancery. There seems to be no case deciding how many years' arrears a Court of Chancery would require to be paid before granting relief; but as there was no statute limiting the amount of arrears payable in such a case, it would seem that the Court would have required the payment of all arrears due, or at least of all arrears which could be recovered by action on the covenant. The ground on which equity grants relief seems to be that the right of re-entry is treated as a security for the rent (1), and hence the ejectment and relief seem to be considered as analogous to foreclosure and redemption, and the use of the word "foreclosed" in the statutes themselves may be thought to favour this view; but whatever analogy there may be, this argument cannot hold good for the purpose of determining the amount of arrears payable to obtain relief, because there is this essential difference between the foreclosure of a mortgage and re-entry for non-payment of rent that a mortgagee cannot, after decree in a foreclosure suit, sue for the debt without opening the foreclosure (2); whereas a landlord, after judgment in ejectment, can recover all his rent by action and retain the land as well (3).

In *Croft v. London and County Banking Company* (4), relief was granted under sect. 1 of the Common Law Procedure Act, 1860, on payment of the arrears due; but it

(1) White & Tudor's L. C. 6th ed. II. 1263.

(2) See Fisher on Mortgages, 4th ed. 958.

(3) See in England, *Hartshorne v. Watson*, 4 Bingh. N. C. 178, and 2 Platt on Leases, 331; in Ireland, 5 G. II. c. 4, s. 2, Ir.

(4) 14 Q. B. D. 347.

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does not appear how many years' arrears were owing, and no question of the statute arose, the point decided being that where the plaintiff had recovered judgment in ejectment against the defendant for forfeiture by non-payment of rent, but had been deprived of his costs, because the arrears of rent had been offered before action brought, the payment of those costs by the defendant could not be made a condition of the granting of relief under sect. 1 of the Common Law Procedure Act, 1860. But it seems to have been assumed that relief would not be granted except on repayment of all arrears due.

Fee-farm
grant and
renewal in
Ireland.

It has been decided that to entitle a lessee in Ireland with a covenant for perpetual renewal to a fee-farm grant, or a renewal, he must pay all fines and fees that have not been paid, without reference to lapse of time or any Statute of Limitations (1).

Possession
of prior
incum-
brancers.

The 42nd section of 3 & 4 Wm. IV. c. 27 contains a proviso that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in receipt of the profits thereof within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years.

The term incumbrancer in this proviso includes a judgment creditor (2). Where arrears of interest are due for a period preceding the possession of the prior incumbrancer, the proviso does not give six years' arrears beyond the time of such possession, but only the arrears during the whole of the possession itself, though it may

(1) *Courtenay v. Parker*, 16 Ir. Ch. R. 320.

(2) *Henry v. Smith*, 2 Dru. & War. 381, 390.

have commenced more than six years before the commencement of the proceeding in which the arrears are recovered (1). The object of the section is only to prevent a puisne incumbrancer from being damaged by the possession of a prior incumbrancer; therefore, where a claim was brought by a creditor having a judgment against a reversioner, the possession of a judgment-creditor of the tenant for life of the lands during the life of such tenant was held not to bring the case within the proviso, as even if there had been no incumbrance on the life estate, the creditor of the reversioner could not have taken any proceeding against the land till the life estate determined (2).

An agreement between a puisne incumbrancer and a prior incumbrancer in possession, that the later charge shall have precedence over the first, will not exclude the puisne incumbrancer from the benefit of the clause if he has no right to take possession of the land (3). But if the owner of land take an assignment of an incumbrance to a trustee for himself, then, though the owner be in possession, neither he nor his trustee is an incumbrancer in possession within the meaning of the proviso, so as to give a subsequent incumbrancer the advantage of it (4).

There is no express exception in favour of disabilities, in cases falling within the 42nd section, any more than in those within the 40th; and, as the existence of a person capable of giving a discharge is not, as in cases falling within the 40th section, a condition precedent to the time beginning to run (5), no disabilities are in any way provided for by the 42nd section (6).

Disabili-
ties.

But in Ireland, in an action of ejectment for non-pay-

(1) *Montgomery v. Southwell*, 2 Con. & Law. 263.

(2) *Vincent v. Going*, 1 Jo. & Lat. 697. See *Smith v. Hill*, 9 Ch. D. 143.

(3) *Drought v. Jones*, 2 Ir. Eq. R. 303.

(4) *Chinnery v. Evans*, 11 H. L. 115; 10 Jur. N.S. 855.

(5) See *ante*, p. 135.

(6) See *De Beauvoir v. Owen*, 5 Exch. 182.

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ment of rent, it has been held that by virtue of sects. 20, 21, and 22 of the Irish Common Law Procedure Act, 1853, and sects. 60 and 77 of the Landlord and Tenant Law Amendment Act (Ireland), 1860, the plaintiff, a minor, was entitled to recover arrears for nineteen years and a half (1).

Arrears of
dower.

By the 41st section of 3 & 4 Wm. IV. c. 27, no arrears of dower are to be recovered by any action or suit for a longer period than six years; and no provision is in this case made for the giving of an acknowledgment in writing.

(1) *Nixon v. Darley*, 2 Ir. R. C. L. 467.

CHAPTER V.

EFFECT OF ACKNOWLEDGMENTS AND PART PAYMENTS
UNDER SECTS. 40 & 42 OF 3 & 4 WM. IV. C. 27, OR
SECT. 8 OF 37 & 38 VICT. C. 57.

BOTH in sect. 40 and in sect. 42 of 3 & 4 Wm. IV. c. 27, and in sect. 8 of 37 & 38 Vict. c. 57, it is provided that a signed acknowledgment shall set time running afresh under those sections; and in sect. 40 of 3 & 4 Wm. IV. c. 27 (now sect. 8 of 37 & 38 Vict. c. 57), the same effect is given to payment of interest or part payment of principal. By sect. 8 of 37 & 38 Vict. c. 57, which has taken the place of sect. 40 of 3 & 4 Wm. IV. c. 27, proceedings are to be commenced within the period of twelve years thereby limited: "Unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent. And in such case, no such action, or suit, or proceeding, shall be brought, but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given."

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3 & 4 Wm.
IV. c. 27,
ss. 40 & 42.

37 & 38
Vict. c. 57,
s. 8.

By sect. 42 of 3 & 4 Wm. IV. c. 27, no arrears, &c., are to be recovered but within six years after they have become due, "or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent."

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Meaning of
"in the
mean-
time."

Acknow-
ledgment
after action
brought as
to sect. 42
of 3 & 4 W.
IV. c. 27.

By the 8th section of 37 & 38 Vict. c. 57, the lapse of twelve years, counting from the accrual of the present right to receive, is a bar to any proceeding to recover a charge on land, unless in the meantime a payment has been made, or an acknowledgment in writing given. It was argued in a case under 3 & 4 Wm. IV. c. 27, that the words "in the meantime" in sect. 40, referred to the period of twenty years from the time that the right accrued; and in two cases (1), an opinion seems to have been expressed that an acknowledgment or part payment made after such a period has once elapsed would have no effect in reviving the right to recover; but in another case (2), the contrary view was taken by the Court of Common Pleas in Ireland. In these cases it seems to have been thought that an acknowledgment or payment made after the lapse of twenty years, might be sufficient to bind the party actually making it, but that it would not affect the rights of another party liable, though it would have been sufficient to bind him if made during the twenty years (3). It should be remarked, too, that while the 40th section of 3 & 4 Wm. IV. c. 27 (now the 8th section of 37 & 38 Vict. c. 57) limits the time for the commencement of proceedings, the 42nd section of 3 & 4 Wm. IV. c. 27 only prevents the recovery of money unless an acknowledgment has been given within six years, and, therefore, an acknowledgment given after action brought is sufficient to except a case from the operation of sect. 42 (4).

With the exception of the points just mentioned, the provisions of sect. 40 of 3 & 4 Wm. IV. c. 27, or sect. 8 of 37 & 38 Vict. c. 57, and of sect. 42 of 3 & 4 Wm. IV. c. 27, are so nearly identical, that the same rules of construc-

(1) *Gregson v. Hindley*, 10 Jur. 383; *Homan v. Andrews*, 1 Ir. Ch. R. 106.

(2) *Harty v. Davis*, 13 Ir. L. R. 23.

(3) See *Becher v. Delacour*, 11 L. R. Ir. 187.

(4) *Tristram v. Harte*, Long & T. 186.

tion apply, and the cases decided on one of these sections apply to the others. It has therefore been thought convenient to discuss the provisions of the sections together. It was decided that the proviso in sect. 40 respecting part payments and acknowledgments is retrospective, so that an acknowledgment made before the passing of 3 & 4 Wm. IV. c. 27, but such as to satisfy the requirements of sect. 40, enlarged the time of limitation (1).

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—

Sect. 40
of 3 & 4
W. IV. c.
27 retro-
spective.

An acknowledgment under these sections must not only, like an acknowledgment under the 5th section of 3 & 4 Wm. IV. c. 42, be made and signed by the party or his agent, but must also be given to the party entitled or his agent. These requirements have received a very liberal construction; thus, where a bill was filed to raise a sum of money to which the plaintiff and one of the defendants were entitled in equal moieties, an admission of the debt in the answer of another defendant, was held a sufficient acknowledgment in a subsequent proceeding by the executor of the first-named defendant to recover his moiety (2). Where a testator by his will directed three of his judgment-creditors, whom he named executors, to pay themselves out of a certain fund, should it be recovered and should they accept the executorship, it was held that although they did not, in fact, accept the executorship, the acknowledgment of their debt in the will was sufficient (3). On the other hand, where the plaintiff claimed as administrator to his wife, a strong opinion was expressed by Knight Bruce, V.-C., that an acknowledgment made to the husband's solicitor before administration granted was insufficient, because, when the acknowledgment was given, the husband was not a person entitled (4).

To whom
acknow-
ledgment
must be
given.

(1) *Vincent v. Willington*, Long & T. 456.

(2) *Blair v. Nugent*, 3 Jon. & Lat. 673.

(3) *Millington v. Thompson*, 3 Ir. Ch. R. 236. See *Scott v. Synge*, 27 L. R. Ir. 560.

(4) *Holland v. Clark*, 1 Y. & C. Ch. 151.

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By whom
acknow-
ledgment
must be
given.

Where a purchaser had been let into possession of property without payment of the purchase-money and died, having devised it to certain trustees who declined to act, and two others were appointed by the Court, it was held that an acknowledgment by the solicitor of the trustees so appointed was an acknowledgment by the agent of the parties liable to pay, so as to keep alive the vendor's lien on the land as against the *cestuis que trustent* (1). And where a testatrix devised an estate to a trustee in trust to sell and pay her debts and hold the residue for certain persons, it was held that an acknowledgment of a debt by the agent of the trustee was a sufficient acknowledgment under sect. 40 of 3 & 4 Wm. IV. c. 27, but that it did not impose upon the trustee any personal liability to pay the debt (2).

What ac-
knowledg-
ment is
sufficient.

It was held in the case last referred to that as the Act only requires some acknowledgment of the right to the money claimed, the acknowledgment need not state the amount of the debt alleged to be due; an acknowledgment which refers to the debt in question is sufficient (3), and parol evidence is admissible to show that the debt referred to in the acknowledgment is the one sought to be recovered, even when the debt is not correctly described in the acknowledgment (4). It was considered in one case (5), and the opinion has been adopted by a writer on Irish judgments (6), and accepted by Lord St. Leonards in his Real Property Statutes (7), that the Legislature, in allowing under sect. 40 twenty years to a creditor from the making of any acknowledgment or

(1) *Toft v. Stephenson*, 7 Hare, 1; S. C. on appeal, 1 De G. M. & G. 28; 21 L. J. Ch. 129.

(2) *St. John v. Boughton*, 9 Sim. 219.

(3) See *Jortin v. South-Eastern Railway Co.*, 6 De G. M. & G. 270; 24 L. J. Ch. 343.

(4) *Hanan v. Power*, 8 Ir. L. R. 505; *Dugdale v. Vize*, 5 Ir. L. R. 568.

(5) *Barrett v. Birmingham*, 4 Ir. Eq. R. 537.

(6) Carleton on Judgments, 178.

(7) Page 136.

part payment, intended to point out certain modes in which a present right to receive could accrue; and in the case referred to, the authorities, which showed that a present right to receive accrues by the revivor of a judgment (1), were treated as if the judges had introduced another mode of ousting the bar of the statute, in addition to those pointed out in the section itself; hence it was considered that a liberal interpretation must be given to the saving clause in the section, and that a master's report or an insolvent's schedule, even though neither might satisfy the statutory requirements as to acknowledgments, should still be treated as giving a present right within the meaning of the section. This view, however, notwithstanding the high authority by which it has been supported, seems to spring from a misconception of the Act, and also of the cases which decide that the revivor of a judgment gives a new present right. The Act does not speak of an acknowledgment as an instance of the accruer of a present right, but as prolonging the time within which the creditor may sue; and however liberally the terms of the exception may be construed, nothing can operate as an acknowledgment unless it can be brought within these terms. The cases on the revivor of a judgment do indeed show that there may be a second accrual of the right to receive, but they in no way show that anything which would not be a good cause of action can make such a right accrue a second time. Before the case of *Barrett v. Birmingham* (2), the Court of Queen's Bench in Ireland had expressly decided that a Master's report was not an acknowledgment within the exception in the 40th section, as the Master was in no sense the agent of the debtor (3). The correctness of this decision was doubted by O'Loughlen, M.R., in *Barrett v. Birmingham*, but the question directly in issue in the

(1) *Ante*, Part III. Ch. II. p. 177, *et seq.*

(2) 4 Ir. Eq. R. 537.

(3) *Hill v. Stawell*, 2 Ir. L. R. 302; 2 Jebb. & Sym. 389.

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CH. V.
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Admission
in an in-
solvent's
schedule

latter case was only whether an admission in an insolvent's schedule was a sufficient acknowledgment, and it was quite unnecessary to consider the effect of a Master's report.

It is submitted that the decision of O'Loghlen, M.R., that an admission of a debt in an insolvent's schedule was an acknowledgment within the 40th section, is correct, and that the decision in *Hill v. Stawell* (1) is also correct, and does not conflict with that in *Barrett v. Birmingham*. The ground of the judgment in *Hill v. Stawell* was that the Master who made the report was not the agent of the debtor, but was acting judicially, so that the report was the act of the Court and not in any way the act of the party. The requirements of the statute, therefore, were clearly not fulfilled. The admission, however, of a debt in an insolvent's schedule was made not by the Court or an officer of the Court, but was made and signed by the debtor himself; and as the schedule was made for the benefit of the creditors, it might well be said to have been made to the creditors. And the objection, that the schedule was filed in court and so was in some sense a public document or that it was not made voluntarily, would apply equally to an answer in Chancery, which, as we have seen, might contain an acknowledgment within the meaning of the 40th section (2). The decision in *Barrett v. Birmingham* is supported by several other cases (3), but in none of them did the point arise in any proceedings in insolvency, but they were all cases of independent actions and suits. Proceedings in insolvency, as distinguished from bankruptcy in Ireland (4), as in England, are now abolished, but the principles of the decisions in these cases may

(1) 2 Ir. L. R. 302.

(2) See *ante*, p. 221.

(3) *Morrogh v. Power*, 5 Ir. L. R. 494; *Dugdale v. Vize*, *ib.* 568; and see *Hanan v. Power*, 8 Ir. L. R. 505. *In re West's Estate*, 3 L. R. Ir. 77.

(4) See 35 & 36 Vict. c. 58, s. 17.

still be of practical importance as illustrating the effect of admissions in bankruptcy and analogous proceedings.

An admission of a debt by a bankrupt in his balance-sheet, statement of affairs or examination, it is submitted, satisfies the statutory requirements of an acknowledgment equally with an admission by an insolvent in his schedule, and can in like manner be set up by the creditor in an independent action, but not in the bankruptcy proceedings themselves. In *Barrett v. Birmingham*, indeed, it was hinted (1) by O’Loghlen, M.R., that there might be a distinction between a bankrupt’s balance-sheet and an insolvent’s schedule, and in the case of *In re Clendinning* (2) Macan, J., agreed that there was a distinction, and seemed to think it lay in this, that a bankrupt could not after his bankruptcy do anything to alter the rights of his creditors, but that the same principle did not equally apply in insolvency. But in the latter case the point arose on a simple contract debt, and in the bankruptcy proceedings themselves; therefore, the question, whether an admission in a bankrupt’s balance-sheet of itself satisfies the statutory requirements of an acknowledgment under the 40th and 42nd sections, did not in fact arise; and the decision, so far as it rests on the incapacity of a bankrupt to alter the rights of his creditors, is inapplicable to cases where the point under discussion arises otherwise than in the bankruptcy proceedings themselves. Although, therefore, the decision is doubtless correct for the reasons stated in a former chapter (3), it is not inconsistent with the position as to bankruptcy laid down above.

In sect. 40 of 3 & 4 Wm. IV. c. 27 (now sect. 8 of 37 & 38 Vict. c. 57), the words “shall have been paid” mean paid “by the person liable to pay” (4). The very

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Admission
by a bank-
rupt.

By whom
must pay-
ments be
made?

(1) 4 Ir. Eq. R. 545.

(2) 9 Ir. Ch. R. 284.

(3) Part I. Ch. IV. p. 101, *et seq.*

(4) *Chinnery v. Evans*, 11 H. L. 115; *Homan v. Andrews*, 1 Ir. Ch. R. 106; *Harlock v. Ashberry*, 19 Ch. D. 539; *Newbould v. Smith*, 29 Ch. D. 882.

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notion of a payment involves that it should be made either by the debtor himself or by some one directly or indirectly authorised to act on his behalf, payment by a mere stranger without the knowledge of the debtor being in fact only a voluntary present of a sum of money to the creditor (1). In all the Statutes of Limitations where payment takes the case out of the operation of the statute, the payment must be such as amounts to an acknowledgment of liability (2). Thus, where a mortgagee enters into possession of the mortgaged estate and receives the rent of it, the payment of rent by the tenant is not a payment under sect. 40 of 3 & 4 Wm. IV. c. 27 (now sect. 8 of 37 & 38 Vict. c. 57) so as to prevent the mortgage debt from being barred (3).

Payments made by a person who under the term of the mortgage contract is entitled to make a tender and from whom the mortgagee is bound to accept a tender for the defeazance or redemption of the mortgage are payments sufficient to prevent the statute from running (4). The payment of interest by the principal debtor prevents the statute running in favour of a surety (5).

Where the owner of lands is liable to indemnify other lands against a charge thereon, a payment by him on account of such charge will keep the charge alive against such other lands (6). And it has been held that a part payment by a bankrupt or a debtor who had assigned his estate to trustees under a bankruptcy Act

(1) See *Homan v. Andrews*, 1 Ir. Ch. R. 112; *Chinnery v. Evans*, 11 H. L. 133; *Stamford, Spalding & Boston Banking Co. v. Smith* (1892), 1 Q. B. at p. 769, *per* Lord Herschell. See *ante*, p. 116.

(2) *Per* Lord Esher, M.R. *Harlock v. Ashberry*, 19 Ch. D. at p. 548.

(3) *Cockburn v. Edwards*, 18 Ch. D. 449, overruling the dictum of Shadwell, V.-C., in *Brocklehurst v. Jessop*, 7 Sim. 442. See *Harlock v. Ashberry*, 19 Ch. D. 539.

(4) *Lewin v. Wilson*, 11 App. Cas. 639.

(5) *In re Powers. Lindsell v. Phillips*, 30 Ch. D. 291. *In re Frisby. Allison v. Frisby*, 43 Ch. D. 106; *Lewin v. Wilson*, 11 App. Cas. 639.

(6) *Homan v. Andrews*, 1 Ir. Ch. R. 106.

will postpone the bar of the statute, as the debtor in making such payment may be considered the agent of the assignee (1), but the decision seems open to doubt. Payment of interest on an Irish mortgage by a receiver appointed under the Irish statute 11 & 12 Geo. III. c. 10 was held to be a payment by an agent of the mortgagor within the meaning of sect. 40, and so was held to keep the mortgage alive (2).

Payment made under an order of the Landed Estates Court in Ireland on account of a creditor's demand is an acknowledgment of the debt by part payment within the meaning of the 23rd section of the Irish Common Law Procedure Act, 1853 (3), the provisions of which on this point have the same effect as those of the 40th section of 3 & 4 Wm. IV. c. 27 (4).

Where a person assigned an annuity to his bankers to secure an advance of £200, and two years afterwards mortgaged to them the equity of redemption in certain leasehold premises to secure the sum of £1500 due on his general balance, the money received on the annuity having been more than sufficient to cover the loan of £200 and interest thereon, the surplus was held to be a payment which kept the mortgage of the leasehold premises from being barred by the 40th section (5).

Where a mortgagor of lands assigned as further security to the mortgagee a policy of insurance on the mortgagor's life, and after the mortgagor's death the amount of the policy was realised by the mortgagee and credited against the mortgage debt, but no other payment was made either of principal or interest, it was held that the payment of the policy was sufficient to prevent the statute running against the mortgage debt (6).

(1) *Vincent v. Willington*, Long & T. 456.

(2) *Chinnery v. Evans*, 11 H. L. 115; 10 Jur. N. S. 855.

(3) 16 & 17 Vict. c. 113.

(4) *Cronin v. Dennehy*, 3 Ir. R. C. L. 289.

(5) *Staley v. Barrett*, 26 L. J. Ch. 321.

(6) *In re Conlan's Estate*, 29 L. R. Ir. 199.

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So where a debtor being indebted to several persons, including two judgment creditors, assigned by deed his life interest in certain property to a trustee on trust to receive the annual income and thereout to effect and maintain policies on the debtor's life and to accumulate the residue, and the deed declared that on the debtor's death the money secured by the policies was to be divided among the creditors, and the trustee received the income of the property assigned and paid out of it the premiums on the policies as they fell due, but no other payment was made to or on behalf of either of the judgment creditors; it was held on the death of the debtor, thirty years after the execution of the deed, that the payments of the premiums by the trustee were, by the terms of the deed, payments on account of principal and interest in respect of the judgment debts, so as to prevent the operation of the statute, and that the judgment creditors were entitled to be paid their debts out of the policies (1).

An owner of land created an equitable mortgage on it and died leaving a widow entitled to dower and three sons heirs in gavelkind. The widow took possession of the estate and paid interest on the mortgage. C., one of the sons, died without ever having been in possession of the property and left children minors, none of whom ever entered into possession. In a suit to realise the mortgage security, commenced more than twenty years after the mortgagor's death, it was held that C.'s children could not rely on the bar of the 40th section of 3 & 4 Wm. IV. c. 27 as protecting their share of the property; since either the widow was their agent and so they were bound by the payments she had made, or else, having been out of possession for twenty years, they were barred (2).

(1) *Scott v. Synge*, 27 L. R. Ir. 560. See *In re Greene's Estate*, 13 L. R. Ir. 461.

(2) *Ames v. Mannering*, 26 Beav. 583.

Where an executrix, who was also tenant for life of a fund subject to legacies to the testator's children, became a lunatic and the fund was transferred into court and the Court invested the fund in an account which was called the account of the lunatic and of the children, it was held that the Court acted as the agent of the lunatic, and by acknowledging the interest of the children took the claim out of the statute as regards the principal, but that as regards the income the children could only claim interest for six years (1).

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OH. V.
—

Under 23 & 24 Vict. c. 38, s. 13, which extends the provisions of sect. 40 to persons dying intestate, it has been held that part payment by an administrator to one of the next of kin out of a particular asset which has fallen in within twenty years will not revive the right to sue for general administration which was barred by statute at the time of payment (2).

Where an acknowledgment in writing has been given or a part payment made by a person having a partial interest in the land charged, or entitled to a part only of such land, a question has frequently arisen whether parties having other interests in the land are bound by such acknowledgment or payment. It has been decided by the House of Lords that, if several estates are comprised in one mortgage, a payment on account of the debt out of the rents of one of them keeps the security alive against all (3). In the case referred to a mortgage was made in 1776 of three separate estates in Ireland, situated respectively in Cork, Kerry, and Limerick. In 1784 a receiver was appointed on the mortgagee's petition, under the Irish Act, 11 & 12 Geo. III. c. 10, over all the estates. The receiver entered into possession of the Limerick estate alone, and from the rents received by him the interest was paid upon the mortgage. A few

Acknowledgment
by owner
of part
of land
charged.

(1) *In re Walker*, L. R. 7 Ch. 120; 41 L. J. Ch. 219.

(2) *In re Johnson. Sly v. Blake*, 29 Ch. D. 964.

(3) *Chinnery v. Evans*, 11 H. L. 115; 10 Jur. N. S. 855.

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years after the receiver had entered into possession of the Limerick estate, the equity of redemption in the Cork and Kerry estates was sold by the mortgagor and the interest continued to be paid out of the Limerick estate exclusively. It was held by the House of Lords in 1864 that the mortgage was kept alive against the Cork and Kerry estates by the payments of interest out of the Limerick estate. This case appears to establish as a rule of general application that, if several estates comprised in one mortgage have come into different hands, either a part payment made or a signed acknowledgment given by or on behalf of the owner of one estate will keep alive the mortgage as a charge on the others, even though they have been for more than twenty years in the hands of *bonâ fide* purchasers for value, who have held without giving any acknowledgment or making any payment on account of the debt. And it is hard to see why the same principle should not apply where the fee simple of a single estate having been mortgaged is afterwards divided into particular interests and a payment or acknowledgment has been made by the owner of one particular interest; moreover, from the wording of the 40th and 42nd sections of 3 & 4 Wm. IV. c. 27, there would seem no reason why this principle, if applicable to the 40th section, should not apply equally to the 42nd section. It was, however, decided by Westbury, L.C., on the 42nd section, that where there are successive mortgages, and arrears of interest for more than six years are due on the first mortgage, an acknowledgment in writing that such arrears are due, signed by the mortgagor, will not enable the first mortgagee to recover the whole amount of the arrears out of the land as against the second and subsequent mortgagees (1).

Lord Westbury, in *Chinnery v. Evans* (2), speaks of the two decisions as reconcilable, and observes that *Bolding*

(1) *Bolding v. Lane*, 1 De G. J. & S. 122; 32 L. J. Ch. 219.

(2) 11 H. L. p. 135.

v. *Lane* arose upon a different section and in reference to a different matter. After stating the decision in *Bolding v. Lane*, he says, "I think that that does not at all interfere with, but is in perfect harmony with the view which I now suggest to your Lordships to adopt. What was decided in *Bolding v. Lane* was this, that the words 'the person by whom the same is payable or his agent,' were words of such large import and meaning that they would not only comprehend the mortgagor and his personal representatives, upon whom the contract would be personally binding, but would also include the second or the third mortgagee, by whom the principal and interest due to the first mortgagee might with propriety be said to be payable, inasmuch as the estate and right of the second mortgagee was subject and posterior to that of the first mortgagee, and he would be entitled to redeem the first mortgagee upon the payment of the principal and interest. Accordingly the effect of that acknowledgment in writing, given under the 42nd section, was confined by that judgment, and I think correctly, to the interest of the individual giving that acknowledgment." After this expression of opinion the case of *Bolding v. Lane* must still be treated as an authority, notwithstanding the decision in *Chinnery v. Evans*. In another case (1), decided by Romilly, M.R., a testator had devised real estate in moieties to two devisees, charging each moiety with the payment of half his debts. One of the two devisees had within twenty years of the commencement of the suit made payments on account of the interest; and it was held that such payments did not prevent the 40th section from operating in favour of the devisee of the other moiety. As by the terms of the will the different moieties were made liable for different debts, there seems nothing in this decision inconsistent with the judgment in *Chinnery v. Evans*. But in Lord

(1) *Dickenson v. Teasdale*, 1 De G. J. & S. 52; 32 L. J. Ch. 37.

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Romilly's judgment there are expressions which it seems difficult to reconcile with the case in the House of Lords.

In an Irish case (1) a tenant for life and remainderman executed a joint and several bond with warrant of attorney for confessing judgment thereon, and judgment was entered against both in 1846 and revived against both in 1848. A receiver over the tenant for life's estate was extended in 1849 to the judgment against the tenant for life and remained in receipt of the rents up to a period within twenty years of proceedings being taken, but no payment was made by either judgment debtor in respect of either judgment debt. The tenant for life died in 1881, and on a motion by the judgment creditor to enforce the judgment of 1846 against the lands of the remainderman, it was held by Ormsby, J., and on appeal by Sullivan, L.C., May, C.J., and Fitzgibbon and Barry, L.JJ., that the judgment had not been kept alive against the remainderman.

Acknowledgment
by tenant
for life.

It was decided in Ireland that a written acknowledgment given by a tenant for life of the equity of redemption in a mortgaged estate will keep alive the mortgagee's right to recover more than six years' arrears of interest against the remainderman (2). And in England it has been decided similarly under sect. 42 of 3 & 4 Wm. IV. c. 27 and under sect. 5 of 3 & 4 Wm. IV c. 42 that payment of interest by a tenant for life of part of the testator's property, who was also interested in the general estate of the testator, keeps alive as against remaindermen the right of the mortgagee of another part of the testator's property to recover the money due under the mortgage (3). It would seem that the question as to the effect of an acknowledgment or payment made by one person binding other parties

(1) *In re Greene's Estate*, 13 L. R. Ir. 461.

(2) *In re Fitzmaurices Minors*, 15 Ir. Ch. R. 445.

(3) *Pears v. Laing*, L. R. 12 Eq. 41.

liable is to be governed by the same principles whether it arises under sect. 5 of 3 & 4 Wm. IV. c. 42, sect. 42 or sect. 40 of 3 & 4 Wm. IV. c. 27, or sect. 8 of 37 & 38 Vict. c. 57, which has taken the place of sect. 40 of 3 & 4 Wm. IV. c. 27. Therefore the cases mentioned above (1) apply to sects. 40 and 42 of 3 & 4 Wm. IV. c. 27; and it would seem now established that where a tenant for life of the real estate of a testator acknowledges or makes a part payment of or payment of interest on account of a debt of the testator, such an acknowledgment will keep the debt alive as against the persons interested in remainder (2).

But while it is the duty of the tenant for life to pay the interest on subsisting charges affecting the inheritance, he is not authorised to revive by payment as against the remainderman a charge which is statute-barred; in *Becher v. Delacour* (3) in Ireland, Sullivan, M.R., held that payment of interest by a tenant for life on a charge more than twenty years after the last payment in respect of the charge did not keep alive the charge as against the remainderman.

It should be noticed that sect. 14 of the Mercantile Law Amendment Act (4) does not apply to sect. 40 of 3 & 4 Wm. IV. c. 27, and therefore not to sect. 8 of 37 & 38 Vict. c. 57. Thus where a mortgagor and a surety covenant for the payment of the debt, payment of interest by the mortgagor will prevent the statute running in favour of the surety (5).

Payment
by co-con-
tractor.

(1) See *ante*, p. 158.

(2) *Pears v. Laing*, L. R. 12 Eq. 41; *Roddam v. Morley*, 1 De G. & J. 1; 26 L. J. Ch. 438. *In re Hollingshead*. *Hollingshead v. Webster*, 37 Ch. D. 651. See *Barclay v. Owen*, 60 L. T. 220; *Chinnery v. Evans*, 11 H. L. 115; *Dibb v. Walker*, 41 W. R. 427.

(3) 11 L. R. Ir. 187.

(4) 19 & 20 Vict. c. 97.

(5) *In re Frisby*. *Allison v. Frisby*, 43 Ch. D. 106. *In re Powers*. *Lindsell v. Phillips*, 30 Ch. D. 291; *Lewin v. Wilson*, 11 App. Cas. 639.

PART IV.

DOCTRINES OF EQUITY ON THE STATUTES OF LIMITATIONS.

CHAPTER I.

CASES IN WHICH EQUITY FOLLOWS THE STATUTES.

PART IV.
CH. I.
Equity and the Statutes of Limitations.

No statute of limitations before 3 & 4 Wm. IV., c. 27, provided in terms for equitable rights, or expressly bound Courts of Equity. Those Courts frequently had occasion incidentally to decide purely legal rights; of this one of the commonest instances was the adjudication on the validity of claims for debts brought in under decrees in administration suits. In these proceedings Courts of Equity decided all questions, including questions on the statutes, as if the claims were being enforced by an action at law. Now in England since the Judicature Act, 1873 (1), and in Ireland since the Irish Judicature Act, 1877 (2), there are no longer superior Courts of Equity or superior Courts of Common Law, but one supreme Court of Judicature, composed of the Court of Appeal and the High Court of Justice, administering law and equity concurrently according to certain rules, which are the same for England as for Ireland, and are laid down in sects. 24 & 25 of the English and sects. 27 & 28 of the

Judicature
Act, 1873.

(1) 36 & 37 Vict. c. 66, s. 3.

(2) 40 & 41 Vict. c. 57, s. 4.

Irish Judicature Act. The Chancery Division of the High Court in England has now jurisdiction to try almost any variety of action which might before the Judicature Act have been brought in the Common Law Courts (1), and the Queen's Bench Division is enabled to grant equitable relief and to give effect to equitable claims and defences in the same way as the Court of Chancery did before the Act (2). By sect. 89 of the English Judicature Act, 1873, similar powers of granting relief are given to every inferior Court with jurisdiction in equity or at law and in equity as regards causes within its jurisdiction; and by sect. 91 of the English Act and sect. 79 of the Irish Act, the rules of law enacted and declared by those Acts are to be in force and receive effect in all Courts whatsoever in England and Ireland respectively. Although the distinction between Courts of Equity and Courts of Law has been abolished, the distinction between rules of equity and rules of law remains (3). All Courts when trying legal claims will be bound by the rules of law, except where such rules have been altered by the Judicature Acts, and the Chancery Division of the High Court in trying a purely legal claim is as much bound by the Statutes of Limitations as the Queen's Bench Division is now, or as the Common Law Courts were before the Judicature Act, 1873, while the Queen's Bench Division in trying equitable claims or defences will be bound by the rules of equity (4). Therefore, it is still of importance to consider the way in which Courts of Equity before the Judicature Acts viewed the Statutes of Limitations when the statutes did not expressly bind them.

Courts of Equity, apart from statutory enactment, gave great effect to lapse of time as a ground for refusing

Courts of
Equity
and the
Statutes of
Limita-
tions.

(1) *Warner v. Murdoch*, 4 Ch. D. at p. 752.

(2) See s. 24 of 36 & 37 Vict. c. 66, s. 27 of 40 & 41 Vict. c. 57.

(3) *Joseph v. Lyons*, 15 Q. B. D, 280.

(4) *In re Greaves. Bray v. Tofield*, 18 Ch. D. p. 554.

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CH. I.
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relief, and framed for their guidance certain rules based on the provisions of the statutes, which rules will now, it seems, bind all Courts when considering equitable rights. The limitations applicable to proceedings in equity concerning real property were provided for by 3 & 4 Wm. IV. c. 27, and, since that statute came into operation, depend no longer upon general principles of equity. The provisions of 3 & 4 Wm. IV. c. 27, relating to real property will be discussed hereafter, but some cases decided prior to the passing of that statute with reference to suits in equity relating to real property are here referred to, because, though not now directly binding, they are valuable as illustrating the general principles on which Courts of Equity dealt with the Statutes of Limitations. These principles cannot, perhaps, be generally stated better than in the words of Lord Camden (1):

“A Court of Equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this Court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the Court is passive and does nothing. Laches and neglect are always discountenanced; and therefore from the beginning of this jurisdiction there was always a limitation to suits in this Court. Therefore in *Fitter v. Lord Macclesfield* (2), Lord North said rightly that, though there was no limitation to a bill of review, yet after twenty-two years he would not reverse a decree but upon very apparent error. *Expedit reipublicae ut sit finis litium* is a maxim that has prevailed in this Court in all times without the help of an Act of Parliament. But as the Court has no legislative authority, it could not properly define the time of

(1) *Smith v. Clay*, 3 Bro. Ch. C. 639, n.

(2) 1 Vern. 293, *sub nom. Fitton v. Macclesfield*.

bar, by a positive rule, to an hour, a minute, or a year; it was governed by circumstances. But as often as Parliament had limited the time of actions and remedies to a certain period in legal proceedings, the Court of Chancery adopted that rule and applied it to similar cases in equity. For when the legislature had fixed the time at law, it would have been preposterous for equity (which by its own proper authority always maintained a limitation) to countenance laches beyond the period that law had been confined to by Parliament. And therefore in all cases where the legal right has been barred by Parliament, the equitable right to the same thing has been concluded by the same bar."

Lord Redesdale expresses the same view in still stronger language. His Lordship says in the case of *Hovenden v. Annesley* (1), which is a leading case on this subject :—

"It is said that Courts of Equity are not within the Statutes of Limitations. This is true in one respect. They are not within the words of the statutes, because the words apply to particular legal remedies; but they are within the spirit and meaning of the statutes and have always been so considered. I think it is a mistake in point of language to say that Courts of Equity act merely by analogy to the statutes; they act in obedience to them. The Statute of Limitations, applying itself to certain legal remedies for recovering the possession of lands, for recovery of debts, &c., equity, which in all cases follows the law, acts on legal titles and legal demands according to matters of conscience which arise and which do not admit of the ordinary legal remedies. Nevertheless in thus administering justice according to the means afforded by a Court of Equity it follows the law. . . I think, therefore, Courts of Equity are bound to yield obedience to the Statute of Limitations upon all legal titles and legal demands and cannot act contrary to the

. (1) 2 Sch. & Lef. 630.

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spirit of its provisions. I think the statute must be taken virtually to include Courts of Equity; for when the legislature by statute limited the proceedings at law in certain cases, and provided no express limitation for proceedings in equity, it must be taken to have contemplated that equity followed the law; and therefore it must be taken to have virtually enacted in the same cases a limitation for Courts of Equity also" (1). Thus there was a distinction between the way in which Courts of Equity dealt with lapse of time in cases where there was an analogous legal remedy within a statute of limitations and where there was no such remedy; in the latter case they were bound by no positive rules, in the former they were bound to the exact period limited by the statute, and all the exceptions in the statute as to disabilities, acknowledgments, or otherwise were held to apply equally with the mere limitation of time (2). It is therefore important in each case, when lapse of time is relied on as a bar to equitable claims, to consider whether there is any legal remedy applicable by analogy to such claims, and if so what limitation of time has been provided by statute for such remedy. The statute 3 & 4 Wm. IV. c. 27, applied to suits in equity for the recovery of land itself and also to suits to enforce legacies and charges on land and to recover arrears of dower and of money charged on land. The 40th and two following sections of 3 & 4 Wm. IV. c. 27, mention not only actions but suits. The effect of these enactments on equitable remedies for recovering these kinds of property has been discussed above (3).

(1) See also *Bond v. Hopkins*, 1 Sch. & Lef. 413, 429; and *Cholmondeley v. Clinton*, 2 J. & W. 1, 138; *Knox v. Gye*, L. R. 5 H. L. at p. 674; *Allcard v. Skinner*, 36 Ch. D. at p. 186.

(2) *Smith v. Clay*, 3 Bro. C. C. 640; *White v. Ewer*, 2 Vent. 340; *Bonny v. Ridgard*, cited *Beckford v. Wade*, 17 Ves. 97. See *Hicks v. Sallitt*, 3 De G. M. & G. 782; *Thomas v. Thomas*, 2 K. & J. 79; 25 L. J. Ch. 159; *McDonnell v. White*, 11 H. L. C. 570.

(3) Part III. and see *post*, Part V. Ch. XIX.

A common case in which questions connected with the Statutes of Limitations arose in equity was in a suit brought for an account, where some person had been in the receipt of money, or in the management of property as trustee for the plaintiff in the suit, or in some other confidential capacity. Where the relation of trustee and *cestui que trust* has been subsisting between the parties, the Statutes of Limitations do not apply (1), except in cases governed by sect. 8 of the Trustee Act, 1888 (2). Although there are no longer suits in equity, and such a proceeding for an account would now be called an action (3), yet it would hardly seem to be an action of account within the meaning of the statute of James, which applies simply to actions at law; but, where there has been no direct trust, the right to an account in such an action would be limited to six years by analogy to those provisions of the statute of James which apply to actions of account at law. Thus, where a person had received the profits of an infant's estate during minority, and the infant filed a bill more than six years after his coming of age, it was held that the suit was barred (4).

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Action for
account.

Where a person equitably entitled to an estate recovers it from one who has held it under a *bonâ fide* adverse possession, the general rule is that the Court will not carry back the account of the rents beyond the filing of the bill. But by *bonâ fide* adverse possession it is meant that the person in possession is ignorant of all the facts and circumstances relating to his adversary's title. The possession of a purchaser for value, who has notice of the instruments on which the title of the rightful owner is founded, cannot be *bonâ fide* within the meaning of the rule. In such a case, if there be no fraud or suppression and no trust, the account of rents will, it seems, be

Mesne pro-
fits in
equity.

(1) See next chapter.

(2) 51 & 52 Vict. c. 59.

(3) R. S. C. 1883, O. I. r. 1 (R. S. C. Ir. 1891, O. I. r. 1).

(4) *Lockey v. Lockey*, Prec. Ch. 518. See *Knox v. Gye*, L. R. 5 H. L. 674.

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limited to the period for which mesne profits could be recovered in an action at law; that is, if the plaintiff has been under no disability, to six years from the commencement of the suit (1). The authorities with regard to the length of time for which an account of mesne profits can be obtained in equity under different circumstances have not been altogether uniform; but in the case of *Hicks v. Sallitt* (2), the various decisions were reviewed by the Court of Appeal, and the law on the subject seems now settled as above stated. If the plaintiff has been under disability for some part of the time during which the land has been in the possession of the defendant and commences an action within six years after the time when the disability ceased, he will at law be entitled to carry back the account through the whole period of disability (3). But if he does not bring his action to recover the land till more than six years after the cessation of disability, such disability will not avail him at all, so far as mesne profits are concerned. In an action of the nature of equitable ejectment brought by a remainderman to recover land from a person to whom the tenant for life had mortgaged her interest in the land, and who had been let into possession by an order of the Court, it was held that, though there was no laches, yet as no fiduciary relations existed between the mortgagee and the remainderman, the remainderman was only entitled to the rents for six years before the filing of the petition (4).

In the case of a legacy left on express trust where there had been considerable delay in taking proceedings to enforce the payment of the legacy, the House of Lords on appeal from the Irish Court of Chancery limited the

(1) *Hicks v. Sallitt*, 3 De G. M. & G. 782; 23 L. J. Ch. 571, 589. See *Nanney v. Williams*, 22 Beav. 452.

(2) 3 De G. M. & G. 782; 23 L. J. Ch. 571, 589.

(3) *Thomas v. Thomas*, 2 K. & J. 79; 25 L. J. Ch. 159; *Pelly v. Bascombe*, 4 Giff. 390; 9 Jur. N. S. 1120.

(4) *Hickman v. Upsall*, 4 Ch. D. 144.

interest on the legacy to six years before the filing of the bill (1).

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Where a *cestui que trust* filed a bill for an account against a trustee on an express trust, and the defendant and his father who were entitled to a share of the trust property had received the whole of the proceeds for their own benefit for fifty-seven years, it was held that owing to the great delay in taking proceedings the account should not go further back than the filing of the bill (2).

In the case of proceedings for foreclosure of a mortgage of a reversionary interest in personalty on which no interest had been paid, Kay, J., allowed interest for fourteen years, no Statute of Limitations applying to such arrears and no delay being proved (3).

Suits for account between partners or between a surviving partner and the executors of a deceased partner were held to be within the rules applicable to actions relating to merchants' accounts at common law; and, if the accounts had not been finally settled between the parties, but were in any way left open, the case was treated as within the exception provided by the Statute of James I. in favour of merchants' accounts and therefore governed by no positive limitations (4). But this exception was abolished by the 9th section of the Mercantile Law Amendment Act, 1856 (5), and all actions for accounts between merchants must be brought within six years from the accrual of the cause of action, and the right of action in respect of an old claim is not saved by the existence of items less than six years old in the same account. But, as has been suggested above (6), it may

Partner-
ship
accounts.

(1) *Thomson v. Eastwood*, 2 App. Ca. 215.

(2) *Smith v. Smith*, 1 L. R. Ir. 206.

(3) *Mellersh v. Brown*, 45 Ch. D. 225.

(4) *Robinson v. Alexander*, 2 Cl. & F. 717; 8 Bli. N. R. 352. See *Tatam v. Williams*, 3 Hare, 347.

(5) 19 & 20 Vict. c. 97.

(6) See p. 6.

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be necessary to look into the accounts previous to the six years in order to ascertain whether particular sums placed to the credit of either party within that period are to be treated as fresh advances or in discharge of a balance due from the person making the payment. The cause of action for an account between partners cannot accrue till the partnership is determined (1).

Contracts
binding the
separate
estate of a
feme covert.

It was at one time doubted whether the Statutes of Limitations applied to proceedings in equity to enforce payment by a married woman of debts which bind her separate estate, but it has now been decided that the statutes do apply (2), and the decisions to the contrary effect (3) cannot now be treated as authorities. The general principle governing the rights and remedies of creditors against the separate estates of married women was laid down by Turner, L.J., in the case of *Johnson v. Gallagher* (4), and has been adopted by the Privy Council (5), and the Court of Appeal (6). According to these authorities the general engagements of a married woman, made on the credit of her separate estate, do not, as was formerly held, operate as appointments under powers or as creating liens or charges on the estate, but by such engagements she contracts debts in respect of her separate property, and the remedy given for the enforcing of such debts is execution against her separate property.

Relief
against
mistake.

Where, under a mistake of fact, trustees transferred a trust fund to a person not entitled as *cestui que trust*, it was held that the trustees might file a bill to compel

(1) *Noyes v. Crawley*, 10 Ch. D. 31; *Knox v. Gye*, L. R. 5. H. L. 656. See Lindley on Partnership, 5th ed. 510.

(2) *In re Lady Hastings. Hallett v. Hastings*, 35 Ch. D. 94. *Beck v. Pierce*, 23 Q. B. D. 322.

(3) *Norton v. Turvill*, 2 P. Wms. 144; *Hodgson v. Williamson*, 15 Ch. D. 87; *Vaughan v. Walker*, 8 Ir. Ch. R. 458.

(4) 3 De G. F. & J. 494; 30 L. J. Ch. 298.

(5) *The London Chartered Bank of Australia v. Lemprière*, L. R. 4 P. C. 572.

(6) *In re Hastings. Hallett v. Hastings*, 35 Ch. D. 94.

such person to refund what he had received at any time within six years after the discovery of the mistake (1), and it was said that mistake was within the same rule as fraud; but this proposition is perhaps too widely stated.

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Before 3 & 4 Wm. IV. c. 27, it was held in equity that charities were not bound by the restrictions of any statute of limitations and that laches could not be imputed to them, but it is now clear that actions by or on behalf of charities are within the 24th, 40th and 42nd sections of that Act and the 8th section of 37 & 38 Vict. c. 57 (2). But of course land, or a charge on land, may be so given as to create an express trust in favour of a charity in the same way as in favour of individuals, and such express trust would be excepted from the operation of the statute of Wm. IV. by the provisions of sect. 25 (3); the same exception applies by analogy to proceedings governed by sects. 40 and 42 of 3 & 4 Wm. IV. c. 27, or sect. 8 of 37 & 38 Vict. c. 57 (4).

Charities.

Generally speaking, lunacy is no obstacle to an action being brought against a lunatic (5). Therefore, in ordinary cases, the Statutes of Limitations will run against a creditor of the lunatic (6). But if the creditor of a lunatic has in any way been brought within the jurisdiction in lunacy, he may be restrained from proceeding to enforce his claim (7), and in such a case the statute will not run against the creditor during the lunacy. The solicitors who had acted in the prosecution

Claims
against
lunatics'
estates.

(1) *Brooksbank v. Smith*, 2 Y. & C. Exch. 58; and see *Denys v. Shuckburgh*, 4 Y. & C. Exch. 42; and *Harris v. Harris*, 29 Beav. 110.

(2) See cases below.

(3) *Commissioners of Charitable Donations v. Wybrants*, 7 Ir. Eq. R. 580, 2 J. & Lat. 182; *Magdalen College v. Attorney General*, 6 H. L. 189, 26 L. J. Ch. 620. *Governors of Magdalen Hospital v. Knotts*, 8 Ch. D. 709; 4 App. Cas. 324. See below, Part V. Ch. XIX.

(4) *Burrowes v. Gore*, 6 H. L. 907; 4 Jur. N. S. 1245; Sug. Prop. Stat. 103; and see below, Part V. Ch. XIX.

(5) *Brockwell v. Bullock*, 22 Q. B. D. 567. See Pope's Lunacy, p. 93.

(6) See *Boldero v. Halpin*, 19 W. R. 320.

(7) Pope's Lunacy, p. 94.

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of a commission of lunacy and also for the committees in lunacy filed a bill to obtain payment of the costs out of the lunatic's estate within six years after the lunatic's death, but more than six years after the debt became due; it was held that an order in lunacy directing the taxation of the costs and an inquiry whether the costs should be raised out of the lunatic's real estate did not constitute the costs a judgment debt, but that the Court would take judicial notice of the fact that the Lord Chancellor would not have allowed the plaintiffs to enforce their demands during the life of the lunatic and would treat the claims as one on which the statute did not operate till the death of the lunatic (1).

The bringing forward a claim in lunacy proceedings after the death of the lunatic is not enough to prevent the claim being barred by the statute. Where the committee of a lunatic had a claim against the lunatic's estate on account of expenses for the lunatic's maintenance, it was held that a petition presented in lunacy after the lunatic's death, though followed by a report in favour of the claim, was not a demand of such a nature as to stop the statute running, and a suit to enforce such claim brought within six years of the report, but more than six years after the lunatic's death, was barred by the statute (2). And where a claim has been made in lunacy during the lunatic's lifetime and disallowed, his representatives will not thereby be prevented from taking the benefit of the statute after his decease (3).

It would seem that the committee of a lunatic, in passing his accounts, will not be allowed a debt from the lunatic to himself which is barred by statute (4).

(1) *Stedman v. Hart*, Kay, 607.

(2) *Wilkinson v. Wilkinson*, 9 Hare, 204.

(3) *Rock v. Cooke*, 1 De G. & Sm. 675.

(4) *Congreve v. Power*, 1 Moll. 122.

CHAPTER II.

CASES IN WHICH EQUITY IS NOT BOUND BY THE
STATUTES.

COURTS of Equity, though acknowledging the general principle that a party was barred of his equitable remedy in the same manner and at the same time as he would be of his right to maintain an action at law in an analogous case, always refused the benefit of the Statutes of Limitations to those in whom it would be against good faith or the general policy of the Court to take advantage of those statutes. The ordinary cases in which this exception was made were those of trust and fraud. These cases are, as far as regards real property, provided for by special provisions in the statute 3 & 4 Wm. IV. c. 27, and though the law there enacted will be found to be for the most part identical with that which Courts of Equity had laid down for their own guidance, yet, as it is now a matter of positive enactment and not dependent on the general principles of Equity, it will be considered in connection with the sections of the statute bearing on the subject (1).

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If the relation of trustee and *cestui que trust* was once actually constituted, so long as it subsisted lapse of time was never allowed by Courts of Equity to affect the rights of the *cestui que trust*. The law on this subject, as recognised and administered in Courts of Equity (2), has now been expressly declared by statute and made

Trusts
excepted
from the
statutes.

(1) See Part V.

(2) *In re Cross. Harston v. Tenison*, 20 Ch. D. 121.

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applicable to all Courts by the Judicature Act, 1873 (1), sect. 25, subsect. 2, of which is as follows: "No claim of a *cestui que trust* against his trustee for any property, held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations." As this is only a statutory declaration of the law administered in Courts of Equity (2), it is still of importance to consider the way in which those Courts, before the Judicature Act, 1873, excepted trusts from the operation of the Statutes of Limitations. Before 3 & 4 Wm. IV., c. 27, if a trustee was in possession of land under a trust which he failed to execute, his possession was treated as that of his *cestui que trust*. Notwithstanding the fact that he did not perform his trust, length of time did not operate as a bar, because his possession was according to his title as trustee (3). This, however, was in strict analogy to the legal doctrine, according to which the occupation of land without payment of rent or acknowledgment of the title of the rightful owner did not, unless the possession was strictly adverse to that title, bar his legal right of entry. When any person is in receipt of money as agent or guardian, or in any other fiduciary capacity for which it is his duty to account, so long as the relation of confidence continues to exist between the parties, no lapse of time can bar the right to an account from the commencement of the transactions. Nor will the statute begin to run when the relation is put an end to; mere lapse of time has never been allowed to protect a trustee in the enjoyment of property of which he obtained possession in the character of trustee (4). Thus, where a testamentary

(1) 36 & 37 Vict. c. 66, s. 25, subs. 2. See in Ireland, 40 & 41 Vict. c. 57, s. 28, subs. 2.

(2) *In re Cross*. *Harston v. Tenison*, 20 Ch. D. 121.

(3) *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 607, 633; *Chalmer v. Bradley*, 1 Jac. & W. 51, 67.

(4) *Mathew v. Brise*, 14 Beav. 341; *Pelly v. Bascombe*, 4 Giff. 390. See *Pare v. Clegg*, 29 Beav. 589; 30 L. J. Ch. 742.

guardian was in receipt of the rents of land during the minority of an infant, but had never accounted for the rents so received, the personal representatives of the ward were allowed to maintain a suit for an account more than six years after the ward's coming of age (1), though a suit for an account in equity would in general be barred by the lapse of six years in analogy to the action at Common Law (2). And where a testator devised land to his widow for her life or widowhood, with remainder to his four infant children, and the widow married again, and continued to receive the rents of the land, it was held in an action for an account by one of the children, who was over twenty-one, that the widow's possession after her second marriage was as bailiff of the children, and that so long as she received the rents, as well after the infancy of the plaintiff had ceased as before, she was accountable (3).

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In applying the general principle that time does not run between trustee and *cestui que trust*, it must always be borne in mind that a trust to oust the operation of the statute must be an express trust constituted by the act of the parties, and not a constructive trust arising by implication of law (4). The person to be affected by the trust must be not merely a wrongdoer in possession without title, whom a Court of Equity would make accountable to those entitled to the beneficial enjoyment, but some one in whom a confidence has been reposed, and who has thereby come into the enjoyment of property (5). Therefore, although it is a rule of equity that one who

Trust must
be express.

(1) *Mathew v. Brise*. But see now *in re Page* (1893), 1 Ch. 305.

(2) See Part IV. Ch. I. p. 239.

(3) *Wall v. Stanwick*, 34 Ch. D. 763.

(4) See 36 & 37 Vict. c. 66, s. 25, subs. 2.

(5) *Townshend v. Townshend*, 1 Bro. Ch. C. 550 app.; *Beckford v. Wade*, 17 Ves. 87; *Petre v. Petre*, 1 Drew. 371; see *Salter v. Cavanagh*, 1 D. & Wal. 668; *Yardley v. Holland*, L. R. 20 Eq. 428; *Sands v. Thompson*, 22 Ch. D. 614; *Churcher v. Martin*, 42 Ch. D. 312; *Patrick v. Simpson*, 24 Q. B. D. 128; *Nugent v. Nugent*, 15 L. R. Ir. 321; *In re Rowe*. *Jacobs v. Hind*, 61 L. T. 581.

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enters on an infant's estate is to be considered during the infant's minority as holding as his guardian or bailiff, yet, if the infant more than six years after coming of age brings an action for an account, the Statute of Limitations is a bar to such an action in Equity as well as at Common Law (1).

It is now decided that a mortgagee is not a trustee of his power of sale for the mortgagor; the dictum of Stuart, V.-C., to the contrary in *Robertson v. Norris* (2) has been frequently dissented from, and is no longer law (3). A mortgagee of a ship who sells under a statutory power of sale is not a trustee of the purchase-money, unless where there is an ascertained surplus (4). But where in a mortgage deed there is an express trust that the surplus shall be paid to the mortgagor, and the mortgaged property is sold and there is a surplus, this surplus is a trust fund and the mortgagee is a trustee for the mortgagor, and the Statute of Limitations cannot be set up as a bar to a claim against him (5). But where, in the case of such a mortgage, the mortgagor's right to redeem is extinguished by the possession of the mortgagee for twelve years, the power of sale and the trusts of the surplus will also be extinguished at the same time (6).

By a post nuptial settlement in 1814, which recited an ante-nuptial agreement by A. (the husband) to settle a sum of £1000 and to enter into certain covenants, and that A. had paid the said sum to B. before the execution of the settlement, B. covenanted with A. to hold the said sum and such further sum as should be paid to B.

(1) *Lockey v. Lockey*, Prec. Ch. 518; *Hovenden v. Annesley*, 2 Sch. & Lef. 632; *Thomas v. Thomas*, 2 K. & J. 79; 1 Jur. N. S. 1160.

(2) 1 Giff. 421.

(3) See *Warner v. Jacob*, 20 Ch. D. 223; *Martinson v. Clowes*, 21 Ch. D. 860; *Nash v. Eads*, 25 Sol. Jo. 95; *Colson v. Williams*, 58 L. J. Ch. 539.

(4) *Banner v. Berridge*, 18 Ch. D. 254.

(5) *In re Bell. Lake v. Bell*, 34 Ch. D. 462.

(6) *Chapman v. Corpe*, 41 L. T. 22.

upon trust to invest the same with the approbation of A. in certain securities, and to hold the trust funds upon trust for A. and his wife for life, and after their death for their children. A. covenanted to pay another sum of £1000 to B., to be held upon the same trusts. Neither of the two sums of £1000 was invested, nor was either sum ever paid by A. to B.; but A. gave a bond to B. for the first-mentioned sum. A. died in 1868. In a suit for the administration of his estate the children claimed to rank as creditors in respect of the two sums of £1000 each. It was held by Giffard, L.J., affirming James, V.-C., on this point, that the obligation with reference to the second sum of £1000 was simply a legal obligation, and that the Statute of Limitations applied; but as regards the first-mentioned sum of £1000, Giffard, L.J., held, overruling James, V.-C., that A. was a trustee of the covenant and was bound to see that it was carried into effect, and that the statute did not apply to a claim against his estate in respect of the breach of trust in not seeing that the covenant was carried into effect (1). It is submitted that in the case of a claim of this kind, where the breach of trust is not fraudulent, the trustee would now, by virtue of the Trustee Act, 1888 (2), be entitled to the benefit of the statute.

If money has been received by a person in the position of a confidential receiver or agent, as by a steward or a barrister's clerk, and has been wilfully misapplied, no time will protect such persons from the liability to account (3). The relation of banker and customer, however, is simply that of debtor and creditor (4). Where money was delivered by a debtor to another person for the purpose of compounding certain of the

Money received by executors, agent, or clerk.

(1) *Stone v. Stone*, L. R. 5 Ch. 74.

(2) 51 & 52 Vict. c. 59.

(3) *Lord Hardwicke v. Vernon*, 14 Ves. 504; *Teed v. Beere*, 28 L. J. Ch. 782; 5 Jur. N. S. 381; and see *Heath v. Henly*, 1 Ch. Cas. 20.

(4) *Foley v. Hill*, 2 H. L. 28.

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debtor's liabilities, and again where money was advanced by A. to B. for the purposes of its being invested for A.'s benefit, in both these cases it was held that the money was received on an express trust and that the Statute of Limitations was no answer to a bill filed for an account (1). Where a testator bequeathed a sum of money to his executor on certain trusts, and the executor severed the legacy from the general personal estate, it was held that he became a trustee of the fund immediately it was so severed, and that the right to recover the legacy was not barred by the 40th section of 3 & 4 Wm. IV. c. 27 (2).

Although, in equity as in law, a claim against an executor personally founded on a *devastavit* is within the statute of James (3), yet, in equity as in law, when the executor is sued as executor for a liability of the testator, he cannot set up a *devastavit* as a defence so as to avail himself of the statute. Thus in an action for the administration of an estate, payments by the executor to the beneficiaries under the will in preference to the creditors will not be allowed the executor in his accounts in discharge of his liability. The executor cannot in respect of payments made more than six years before the action set up as a defence that such payments were acts amounting to a *devastavit*, and that no claim in respect of them can be made after the expiration of more than six years (4).

A statutory exception in favour of trustees, giving them in certain cases the benefit of the Statutes of Limitations, is to be found in the 8th section of the Trustee Act, 1888 (5), the provisions of which will be discussed hereafter (6).

(1) *Sheldon v. Weldman*, 1 Ch. Ca. 26; *James v. Holmes*, 31 L. J. Ch. 567; 10 W. R. 634. See cases, *ante* Part I. Ch. I. p. 10.

(2) *Phillipo v. Munnings*, 2 M. & C. 309; see also Part. III. Ch. I.

(3) *In re Gale. Blake v. Gale*, 22 Ch. D. 820.

(4) *In re Marsden. Bowden v. Layland*, 26 Ch. D. 783; *In re Hyatt. Bowles v. Hyatt*, 38 Ch. D. 609.

(5) 51 & 52 Vict. c. 59.

(6) See *post*, p. 259 *et seq.*

Questions frequently arise as to how far the rights of persons beneficially entitled to *choses in action* are affected by the Statutes of Limitations, and whether, when the right of their trustees to sue at law is barred, they are barred also. The solution of these questions seems to depend on whether, apart from the operation of the statutes, the persons beneficially interested, have a direct remedy in equity against the person liable to pay or are merely entitled to the benefit of the legal remedy of the trustees. Where a settlor covenants to pay, or gives a bond for money to trustees to be held on certain trusts, it is clear (1), though Wood, V.-C., at one time expressed a contrary opinion (2), that the *cestuis que trustent* have a direct equitable remedy against the settlor besides their right to the benefit of an action on the covenant by their trustees. It would seem also to be settled that if trust moneys be improperly advanced to a *cestui que trust* under a power in a settlement (3), or advanced to and knowingly received by a person in such a way as to be a breach of trust (4), the person to whom the trust moneys are so advanced is not only liable as an ordinary debtor at law, but becomes a debtor clothed with such a fiduciary character as to render himself liable in equity to be sued for the recovery of the moneys by the persons beneficially entitled. In like manner, where trustees paid by mistake to one of the *cestuis que trustent* a larger share of the trust funds than he was entitled to under the trusts, he was held liable at the suit of other *cestuis que trustent* to refund the sum paid to him in excess, although the trustees could recover it by an action at law (5). So also it would seem that if a person, who is

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Are *cestuis que trustent* barred at same time as their trustees?

(1) *Burrowes v. Gore*, 6 H. L. 907; 4 Jur. N. S. 1245.

(2) *Spickernell v. Hotham*, Kay, 675.

(3) *Coxwell v. Franklinski*, 11 L. T. N. S. 153; *Jenner v. Akerman*, 10 Jur. N. S. 465; and see *Spickernell v. Hotham*, Kay, 676.

(4) *Ernest v. Croysdill*, 2 De G. F. & J. 175, 198; and see *Spickernell v. Hotham*, Kay, 676.

(5) *Harris v. Harris* (No. 2), 29 Beav. 110.

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under a legal obligation to pay moneys which he knows to be trust moneys, deals with them in such a way that the *cestuis que trustent* cannot have the benefit of them, he will by such dealing render himself liable to be sued in equity (1). Thus, although the remedy of a customer against a banker for money deposited is by action at law only (2), still, where a sum of money was standing to the credit of trustees in the books of bankers, who had notice of the trust, and the bankers by an arrangement made at their own suggestion with the husband of the tenant for life of the trust fund transferred part of it to his account and thereby obtained payment of a debt due from him to the bank, it was held that the bankers were liable in equity to replace the money (3).

It seems clear from all the cases that have been decided on this subject that the only ground on which *cestuis que trustent* are allowed a direct remedy against a person who is under a legal obligation to pay trust money is either that such person is a party to the trust, or privy to a breach of trust. Therefore, where neither of these grounds exists, the only remedy of the *cestuis que trustent* against such person is by action brought in the name of the trustees; and when the right of the trustees to bring such an action is barred by statute, the *cestuis que trustent* are necessarily without remedy against such person, whatever their remedy may be against the trustees themselves. Although, however, it is clear that in some cases persons beneficially entitled to *choses in action* have a direct remedy in equity against the debtor, it does not follow that the Statutes of Limitations have no application in such cases. This would depend on the further question whether the relation between the *cestui que trust* and the debtor is such as merely to give the latter

(1) See judgment of Lord Weusleydale in *Burrowes v. Gore*, 6 H. L. 967; 4 Jur. N. S. 1256; and see *Cresswell v. Dewell*, 4 Giff. 460.

(2) *Foley v. Hill*, 2 H. L. 28.

(3) *Bridgman v. Gill*, 24 Beav. 302.

a remedy analogous to some legal remedy, or whether it is of such a fiduciary nature as to exclude the operation of the statute altogether.

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In the case of a settlor covenanting to pay money upon trusts, although Chelmsford, L.C. (1), and Lord Cranworth (2) were of opinion that the statute had no application, Lord St. Leonards was strongly of opinion the other way (3), and to this extent Lord Wensleydale (4) certainly agreed with him. As in such cases there never has been an existing trust fund on which the trusts could be impressed (5), the equitable right is founded on the principle that the settlement is regarded in equity as a contract entered into between the settlor on the one side and all persons claiming under the settlement on the other, and is nothing more than an equitable right to recover the money analogous to the right of the trustees to sue for it at law. In the case of *Stone v. Stone* (6), where the children of the settlor who were entitled in remainder after his death brought in a claim in the administration of his estate for a sum of money which the settlor had covenanted to pay to a trustee, Giffard, L.J., affirming James, V.-C., on this point, held that the obligation on the part of the settlor was a purely legal one, and that the statute was a bar to the claim. In this case it seems to have been assumed without argument that the remedy of the *cestui que trust* was barred at the same time as that of the trustee (7).

Covenant
to settle.

Where the equitable liability is founded solely on the person charged being privy to a breach of trust, he might perhaps be thought to fall rather within the class

(1) *Burrowes v. Gore*, 6 H. L. 940; 4 Jur. N. S. 1250.

(2) *Ib.* 6 H. L. 945; 4 Jur. N. S. 1251.

(3) *Burrowes v. Gore*, 6 H. L. 950; 4 Jur. N. S. 1252.

(4) *Ib.* 6 H. L. 965; 4 Jur. N. S. 1255.

(5) See *Spickernell v. Hotham*, Kay, 675; and *Stone v. Stone*, L. R. 5 Ch. 74.

(6) L. R. 5 Ch. 74.

(7) See The Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8, subs. 1 (b).

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of constructive trustees who are not excluded from the benefit of the statute than within that of express trustees who cannot avail themselves of it. In some of the cases referred to above the point was not material, as it appeared that the *cestuis que trustent* themselves, owing to infancy or other circumstances, would not have been barred even if the statute could have been set up against them. However, it seems to have been considered in all these cases, except that of a settlor covenanting to pay upon trusts, that the statute had no application. In *Bridgman v. Gill* (1), above referred to, it was held by Romilly, M.R., that, as the *cestuis que trustent* could sue in equity, not only could the trustees do so, as representing their *cestuis que trustent*, but that the statute was also inapplicable as against the trustees; but it is by no means clear that this would have been held in all the cases referred to. However, Wood, V.-C., appears to have acted on the same principle in *Spickernell v. Hotham* (2), when the question arose on a claim brought in by the trustees in a suit for the administration of the estate of the persons to whom they had advanced the money.

Trust fund
lent to
tenant for
life.

With regard to these questions, which frequently occur where trust moneys are advanced to a tenant for life of the fund, another consideration sometimes arises, namely, whether, as the tenant for life is the person to pay the interest to the trustees and to receive it back from them, the statute can possibly begin to run during his life, as there is the same hand to pay and to receive interest. It seems settled that in equity time will not run in such a case (3) except where there has never been a trust fund actually in existence; as, for instance, where the person entitled as tenant for life had as settlor covenanted to

(1) 24 Beav. 302.

(2) Kay, 676.

(3) *Mills v. Borthwick*, 35 L. J. Ch. 31; 11 Jur. N. S. 558; and see *Jenner v. Akerman*, 10 Jur. N. S. 465; *Topham v. Booth*, 35 Ch. D. 607.

pay the money and had never done so (1). This question, as was mentioned above (2), seems to depend on whether the whole transaction amounts to a constructive payment of interest. It is believed that the question has never been raised at law, but it is clear from the cases that the principle is applicable when the claim is brought in by the trustees themselves in an administration action.

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If a trustee has been guilty of a breach of trust as to which no protection is afforded by the Trustee Act, 1888, the statute will not run even after his death against the claim of the *cestui que trust* on the trustee's estate (3). The contrary was formerly held in Ireland (4), but the decisions to that effect have been overruled (5).

Liability of
trustee's
estate.

It remains to be seen how the creation of a trust for the payment of debts affects the operation of the statutes on claims already in existence. It is not every transfer of property to trustees for payment of debts which invests the creditors with the character of *cestuis que trustent*. Such a transfer by a debtor in his life-time, without the concurrence of the creditors, gives them no right to enforce the execution of the trusts, but operates merely as a direction to the trustees, pointing out the way in which they are to apply the property vested in them for the benefit of the debtor who alone stands towards them in the relation of *cestui que trust* (6). Therefore a trans-

Convey-
ance *inter*
vivos to
pay debts.

(1) *Spickernell v. Hotham*, Kay, 673.

(2) Part I. Ch. V. p. 115.

(3) *Obee v. Bishop*, 1 De G. F. & J. 137; *Story v. Gape*, 2 Jur. N. S. 706; *Coxwell v. Franklinski*, 11 L. T. N. S. 154; *Woodhouse v. Woodhouse*, L. R. 8 Eq. 514; *Brittlebank v. Goodwin*, L. R. 5 Eq. 545; *In re Burge*, *Gillard v. Lawrenson*, 57 L. T. 364; *In re Blake*; *Blake v. Power*, 60 L. T. 663.

(4) *Dunne v. Doran*, 13 Ir. Eq. R. 545; *Brereton v. Hutchinson*, 3 Ir. Ch. R. 361; *Newport v. Bryan*, 5 Ir. Ch. R. 119.

(5) See *Carroll v. Hargrave*, 5 Ir. Rep. Eq. 548; *Smith v. Cork and Bandon Railway Co.* 5 Ir. Rep. Eq. 76.

(6) *Garrard v. Lauderdale*, 3 Sim. 1; 2 Russ. & My. 451; *Henriques v. Bensusan*, 20 W. R. 351; *In re Sanders' Trusts*, 47 L. J. Ch. 667; *Johns v. James*, 8 Ch. D. 744. See 1 White & Tudor, L. C. 6th ed. 303.

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action of this sort can have no effect in saving a debt from the operation of the statute. But the principle of *Garrard v. Lauderdale* (1), just referred to, does not apply when the trusts declared by the deed are to take effect only after the death of the settlor; in such a case the persons in whose favour the trusts are declared are *cestuis que trustent* (2). And when the creditors are parties to the assignment, or it is communicated to them, the relation of trustee and *cestui que trust* is constituted between the assignees in trust and every one of the creditors (3); and, so long as the property remains in the hands of the assignees, the right of any creditor to an account of the property and to payment out of it was, before 37 & 38 Vict. c. 57, not barred by lapse of time (4). But now, by virtue of sect. 10 of that statute, where any sum of money is charged upon or payable out of real estate and secured by an express trust, the statute will run as if there were no such trust. This section has no application to trusts for the payment of debts out of personal estate; and as regards such trusts the statute will not run.

When an assignment of property is made so as to raise a trust in favour of creditors in general, a debt barred at the date of the assignment would not be revived unless there was something in the assignment sufficient to operate as an acknowledgment of the debt to the creditor or a direction to the trustees to include that debt among those to be paid. A trust to pay debts in general without such acknowledgment or direction would probably be held to be a trust to pay only such debts as the debtor was legally bound to pay. But as a debtor may

(1) *Garrard v. Lauderdale*, 3 Sim. 1; 2 Russ. & My. 451; *Henriques v. Bensusan*, 20 W. R. 351; *in re Sanders' Trusts*, 47 L. J. Ch. 667; *Johns v. James*, 8 Ch. D. 744. See 1 White & Tudor, L. C. 6th ed. 303.

(2) *In re Fitzgerald's Settlement*. *Fitzgerald v. White*, 37 Ch. D. 18. See *Synnot v. Simpson*, 5 H. L. C. 141.

(3) *Acton v. Woodgate*, 2 M. & K. 492; 1 White & Tudor, L. C. 6th ed. 305.

(4) *Pare v. Clegg*, 29 Beav. 589; 30 L. J. Ch. 742.

waive the benefit of the statute against himself, he can of course include in a trust for payment of his debts any debts which he is morally bound to pay, though the time for enforcing them may have elapsed (1).

A trust in a will for the payment of the testator's debts in general will not revive a debt upon which the Statute of Limitations has taken effect at the time of the testator's death (2). Nor will a trust of personal estate declared by will have the effect of preventing the statute from being set up as a defence even as to debts upon which the statute had not taken effect in the testator's lifetime, as the executors are by law trustees of the personal estate for the creditors, and the provisions of the will do not add anything to their legal liability. And the case is not altered by the fact that the testator believed the personal estate of which the trust is declared to be realty and devised it as such (3). But a provision by a testator for payment of his debts out of his realty includes all debts recoverable at his death, and therefore as to debts not then barred the statute ceases to run (4). Before the statute 37 & 38 Vict. c. 57, if the provision was merely by a charge without any fiduciary relation being established between the devisee and the creditors, a new right accrued at the time of the testator's death, against which time immediately began to run under the 40th section of 3 & 4 Wm. IV. c. 27, but if a trust was created for the payment of debts, the statute did not run at all as between the creditors and the devisee in trust (5). But since 37 & 38 Vict. c. 57, it is now immaterial whether the provision is by a charge or by a trust, as by virtue

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Trust in
will for
payment of
debts.

(1) See *Scott v. Jones*, 4 Cl. & F. 391.

(2) *Burke v. Jones*, 2 Ves. & B. 275; see *O'Connor v. Haslam*, 5 H. L. C. 170, 178.

(3) *Scott v. Jones*, 4 Cl. & F. 382; *in re Hepburn, ex parte Smith*, 14 Q. B. D. 394.

(4) *Fergus v. Gore*, 1 Sch. & Lef. 107; *Hargreaves v. Michell*, 6 Mad. 326; *Hughes v. Wynne*, T. & R. 307; and see *O'Connor v. Haslam*, 5 H. L. C. 170.

(5) See below, Part V. Ch. XIX.

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not deprive any executor or administrator of any right or defence to which he is entitled under any existing Statute of Limitations.”

Sub-sect. 1 (a) has not interfered with the principle laid down in *Blair v. Bromley* (1), that where funds are paid to a firm for the purposes of investment and are fraudulently dealt with, and a misrepresentation is made by one of several partners which prevents the discovery of the fraud, the parties whose interest is affected by the misrepresentation have a right to be placed in the same situation as if the facts represented were true, and time will not run against them till the discovery of the fraud which has been concealed by the misrepresentations (2).

An action against a trustee for a declaration that the trustee is liable to make good a loss from not realising residuary personal estate and for payment of the plaintiff's share into Court is an action within sub-sect. 1 (b) of sect 8 of the Trustee Act, 1888, and such an action is not maintainable after the expiration of six years from the alleged breach of trust (3). So is an action against a trustee to compel him to make good losses arising from investments negligently made (4). Time runs in such a case from the date of the negligence, and not from the time when the loss occurred to the *cestui que trust* (5). The exception in sub-sect. 1, referring to trust property “received by the trustee and converted to his use,” does not apply to a case where trust funds advanced on mortgage are with the concurrence of the mortgagor applied in payment of a debt previously charged on the mortgaged property in favour of a firm of which the trustee is a partner (6).

(1) 2 Phillips, 354 ; 5 Hare, 542. See *ante*, Part I. Ch. II.

(2) *Moore v. Knight* (1891), 1 Ch. 547.

(3) *In re Swain. Swain v. Bringeman* (1891), 3 Ch. 233. See *In re Page. Jones v. Morgan*, 1893, 1 Ch. 304.

(4) *In re Bowden. Andrew v. Cooper*, 45 Ch. D. 444.

(5) *In re Somerset. Somerset v. Poulet*, W. N. 1893, p. 66 ; 37 Sol. Jo. 424.

(6) *In re Gurney. Mason v. Mercer* (1893), 1 Ch. 590.

Courts of Equity were always active in giving relief against fraud. In cases of fraud, where a precise limitation of time is not provided by statute, it is impossible to define when the person applying for relief would be held to be too late (1). And even in cases within the Statutes of Limitations the right of a person to upset a transaction on the ground of fraud or undue influence will not be barred, while he remains ignorant of the fraud or the undue influence continues (2). And if relief is sought against a wrong which has been kept concealed by the fraud of the wrongdoer, the Courts have never considered themselves prevented from giving redress by the lapse of the statutory period which would in other cases have been a bar to the suit. As fraud in its nature is a secret thing, and the injured party is by the imposition practised upon him prevented from discovering and prosecuting his rights, such cases do not in the contemplation of equity come within the principle of the statute.

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Fraud.

In order to constitute a case of fraud, which in contemplation of equity takes a case out of the Statutes of Limitations, it is not sufficient that there should be merely a tortious act unknown to the injured party, or enjoyment of property without title while the rightful owner is ignorant of his claims; there must be some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts (3). The mere taking coal tortiously from another person's mine is not fraud so as to entitle the plaintiff to an account more than six years afterwards; but if the coal be taken intentionally, and steps be taken to prevent the plaintiff from discovering the wrong, this is a fraud which will

What fraud
is excepted
from the
statutes.

(1) *Morse v. Royal*, 12 Ves. 355, 374.

(2) *Roche v. O'Brien*, 1 Ball & Beat. 330; *Blennerhassett v. Day*, 2 Ball & Beat. 104; *Hatch v. Hatch*, 9 Ves. 292.

(3) *Dean v. Thwaite*, 21 Beav. 621; see *Lewellin v. Mackworth*, 2 Eq. Ca. Ab. 579.

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take away the defendant's right to plead the statute (1). Where a testator having a sum owing to him from G. made a specific bequest of the debt to R. on certain trusts, and after the testator's death R. set off the amount against a private debt due from himself to G. who had notice of the trusts, it was held that this was a fraudulent abstraction of the trust property by R. and a fraudulent receipt and appropriation of it by G. for his own personal benefit; relief against such a transaction being given on the ground of fraud, the remedy was not taken away by lapse of time, and G., the debtor, was ordered after the lapse of more than twenty years to refund the amount of the debt to the persons beneficially entitled (2). Where a guardian and devisee in trust obtained a conveyance at an undervalue from his wards as soon as they came of age (3), and where a reversionary grant at an undervalue was obtained from an expectant heir in distressed circumstances by an attorney who had full knowledge of the value of the estate, and had great influence over the grantor (4); these were held fraudulent transactions against which the Court would grant relief after more than twenty years.

The improper exercise of a power of sale contained in a mortgage-deed, not for the purpose of obtaining payment of the debt, but in order indirectly to get the property into the hands of the mortgagee, is a fraudulent act which will not be protected from impeachment by lapse of time (5).

Where there has been fraud in the settlement of

(1) *Dean v. Thwaite*, 21 Beav. 621; *Ecclesiastical Commissioners for England v. North-Eastern Railway Co.* 4 Ch. D. 845; *Trotter v. Maclean*, 13 Ch. D. 574; *Dawes v. Bagnall*, 23 W. R. 690.

(2) *Rolfe v. Gregory*, 11 Jur. N. S. 98; 34 L. J. Ch. 274.

(3) *Alden v. Gregory*, 2 Eden, 280; *Hatch v. Hatch*, 9 Ves. 292.

(4) *Roche v. O'Brien*, 1 Ball & B. 330: see *Charter v. Trevelyan*, 11 C. & F. 714; and *Gresley v. Mousley*, 1 Giff. 450.

(5) *Robertson v. Norris*, 1 Giff. 421; 4 Jur. N. S. 155, 443. *Pooley's Trustee v. Whetham*, 33 Ch. D. 123; *Farrar v. Farrar*, 40 Ch. D. 409.

accounts, it is said that the Court will not only give leave to surcharge and falsify, but, if it be necessary for the protection of the party imposed upon, will decree that the whole accounts be reopened, notwithstanding the lapse of any number of years (1).

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Not only will fraud induce a Court of Equity to disregard lapse of time as affecting a remedy which a party has in equity, but it is in itself a ground for equitable relief even in a case where a plaintiff has a direct remedy at law (2).

Fraud is a ground of equitable jurisdiction.

As, however, the concealment of the fraud is the ground for excepting such cases from the operation of the statute, the exception ceases to hold when the facts have been once discovered; time begins to run from the date of such discovery as from the accrual of a new right, and if the party entitled to relief then suffers the prescribed period to elapse without pursuing his remedy, his right to redress is entirely barred (3). And therefore, in proceedings impeaching accounts on the ground of fraud, when the settlement is more than six years old, it must be charged that the fraud was discovered within six years of the commencement of the proceedings (4).

In some cases, even where the period of limitation has not elapsed since the discovery of the fraud, equity will refuse relief on the ground of laches, if the person seeking relief has not come into court with reasonable speed after the facts have been brought to his knowledge, especially if by his supineness the position of other persons has become changed. If a person being aware of his rights sits still without asserting them, and

Laches and acquiescence.

(1) *Vernon v. Vawdry*, 2 Atk. 119; *Allfrey v. Allfrey*, 1 Mac. & G. 87.

(2) *Blair v. Bromley*, 5 Hare, 542, 2 Phillips, 354.

(3) *South Sea Company v. Wymondsell*, 3 P. Wms. 143; *Medlicott v. O'Donel*, 1 Ball & Beat. 156; *Marquis of Clanricarde v. Henning*, 30 Beav. 175; and see *Beaden v. King*, 9 Hare, 499, 532; *Metropolitan Bank v. Heiron*, 5 Exch. D. 319; *In Re Fitzroy Bessemer Steel Co.* 50 L. T. 144.

(4) *South Sea Company v. Wymondsell*, *ubi supra*.

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permits other persons to acquire interests in and consider themselves as the owners of property to which he does not assert his claim, every presumption will be made against his right (1). Even in cases of gross fraud, it has been said that the Court does not do justice by decreeing an account after considerable length of time against executors, legatees, and innocent persons claiming under the fraudulent party (2). But it is only when a person is seeking equitable relief that delay is a bar to his claims (3); when the plaintiff is seeking to enforce a legal right, no amount of delay short of the statutory period of limitation will be an objection to his claim (4).

It is a general rule that Courts of Equity will not assist a person who sleeps upon his rights and neglects to enforce them within a reasonable time (5). Where fraud is charged, lapse of time, or delay on the part of the person complaining is in itself some evidence that the transaction was understood by the parties at the time and was not fraudulent, and makes it incumbent on the Court to weigh all the circumstances of the case, and to consider what evidence there may have been in favour of the honesty of the transaction which from lapse of time may be lost (6).

(1) *Byrne v. Frere*, 2 Moll. 157; *Pickering v. Stamford*, 2 Ves. 272, 280; *Champion v. Rigby*, 1 Russ. & M. 539; *Baker v. Read*, 18 Beav. 398; *Roberts v. Tunstall*, 4 Hare, 257; *Sibbering v. Earl of Balcarras*, 3 De G. & Sm. 735; and see *Harcourt v. White*, 28 Beav. 303; *Sleeman v. Wilson*, 25 L. T. N. S. 408.

(2) *Hercy v. Dinwoody*, 2 Ves. 87, 92. But see *Charter v. Trevelyan*, 11 C. & F. 740.

(3) *Blake v. Gale*, 31 Ch. D. 196.

(4) *In re Maddever. Three Towns Banking Company v. Maddever*, 27 Ch. D. 523. *In re Baker. Collins v. Rhodes*, 20 Ch. D. 230.

(5) Story on Equity, s. 1520. *Cholmondeley v. Clinton*, 2 J. & W. 141; and see *Harcourt v. White*, 28 Beav. 303, 310; *Smallcombe's Case*, L. R. 3 Eq. 769; L. R. 3 H. L. 249; *Allcard v. Skinner*, 36 Ch. D. 145; *Turner v. Collins*, L. R. 7 Ch. 329; *Carey v. Cuthbert*, 7 Ir. R. Eq. 542; 9 Ir. R. Eq. 330.

(6) *Charter v. Trevelyan*, 11 Cl. & F. 714, 740; see *Hatch v. Hatch*, 9 Ves. 297; *Morse v. Royal*, 12 Ves. 374; *Sibbering v. Earl of Balcarras*, 3 De G. & Sm. 735.

It is impossible to lay down any rule as to the amount of laches or acquiescence which will preclude a person from asserting his rights in equity. Delay in prosecuting such rights is merely one circumstance which will be taken into consideration by the Court in determining what is the equitable course to be adopted as regards the interests of the different parties concerned (1); and such delay may be explained by other circumstances in the case. For instance, where a defendant insists on lapse of time, not as an absolute statutory bar, but as showing such delay on the part of the plaintiff as amounts to a tacit confession of want of merits, or displaying such laches or acquiescence as ought to prevent him from impeaching a transaction long left at rest, circumstances of embarrassment or continuing influence become very material as accounting for the injured person forbearing to enforce his rights (2). On this point Courts of Equity draw a distinction between "*executed*" and "*executory interests*." "Where a person is obliged to apply for the peculiar relief afforded by a Court of Equity to enforce the performance of an agreement, or to declare a trust, or to obtain any other right of which he is not in possession and which may be described as an executory interest, it is an invariable principle of the Court that the party must come promptly, that there must be no unreasonable delay. And if there is anything that amounts to laches on his part, Courts of Equity have always said, We will refuse you relief. With regard to interests which are executed, the consideration is entirely different. There mere laches will not of itself disentitle the party to relief by a Court of Equity; but a party may by standing by, as it has been metaphorically called, waive or abandon any right which he may possess, and which under the

(1) *Pomfret v. Windsor*, 2 Ves. Sen. 482; and see *Bonney v. Ridgard*, 1 Cox, 145, 149; *Carey v. Cuthbert*, 7 Ir. R. Eq. 542; 9 Ir. R. Eq. 330.

(2) *Byrne v. Frere*, 2 Moll. 157, 171; *Purcell v. McNamara*, 14 Ves. 91; *Roberts v. Tunstall*, 4 Hare, 257, 267.

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circumstances, therefore, a Court of Equity may say he is not entitled to enforce" (1). It may be stated as a general rule that, where there is a statutory period of limitation, delay for any length of time short of that will not be an absolute bar to the plaintiff's right to relief, except where by reason of such delay innocent persons have been allowed to acquire interests which would be prejudiced by such relief being granted (2). The distinction between the defence grounded on mere laches and that of acquiescence cannot perhaps be better stated generally than in the words of Lord Wensleydale. His lordship says in the case of *Archbold v. Scully* (3): "I take it that, where there is a Statute of Limitations, the objection of simple laches does not apply until the expiration of the time allowed by the statute. But acquiescence is a different thing; it means more than laches. If a party, who could object, lies by and knowingly permits another to incur an expense in doing an act under a belief that it would not be objected to, and so a kind of permission may be said to be given to another to alter his condition, he may be said to acquiesce; but the fact of simply neglecting to enforce a claim for the period which the law permits him to delay without losing his right, I conceive cannot be any equitable bar."

It is clear from all the cases referred to, that neither laches nor acquiescence can be imputed to one who is ignorant of the facts; it would seem to be a question of some doubt how far the same rule applies to ignorance of or mistake in law only (4). It is also clear from the

(1) Per Chelmsford, L. C. *Clarke v. Hart*, 6 H. L. 655. See *Rule v. Jewell*, 18 Ch. D. 660; *Garden Gully United Quartz Mining Co. v. McLister*, 1 App. Cas. 39; *Erlanger v. New Sombrero Phosphate Co.* 3 App. Cas. 1218.

(2) *Pickering v. Stamford*, 2 Ves. 272, 280; *Blake v. Gale*, 31 Ch. D. 196.

(3) 9 H. L. 383.

(4) *Cockerell v. Cholmeley*, 1 Russ. & M. 424; *McCarthy v. Decaix*, 2 Russ. & M. 614; *Marker v. Marker*, 9 Hare, 1, 16; *Stone v. Godfrey*,

cases referred to, that laches cannot be imputed to persons under disability as infants or lunatics (1). A *feme covert* before the Married Women's Property Act, 1882 (2), was as to separate estate treated as a *feme sole*, except perhaps where she was restrained from anticipation (3). But now, apart from the provisions of the Married Women's Property Act, 1882, it is expressly enacted by the Trustee Act, 1888 (4), s. 8. subs. 1 (b), that "the statute (*sic*) shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation."

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Before the Judicature Act, 1873, in those cases in which a Court of Equity disregarded lapse of time, not only did it do so where it gave a direct remedy by its own decree, but also, where it put a question in a train of discussion at law by directing a trial to ascertain facts, and the law arising on those facts, it prevented the defendant taking advantage of lapse of time to defeat the plaintiff's claim in the same way as it prevented an outstanding term being set up against conscience for the same purpose (5). It is a principle of equity that a person will be relieved from injustice caused by the act or oversight of the Court, when the Court has been led into such act or oversight at the instance of the opposite side; therefore, before the Judicature Act, 1873, if a person was prevented by a Court of Equity from proceeding to establish his right at law, the Court took care that no injury arose to him in consequence of its interference; and if the period had elapsed within which such

Indirect
action of
Courts of
Equity in
disregard-
ing lapse
of time.

5 De G. M. & G. 76; *Burrows v. Walls*, 5 De G. M. & G. 233, 254; *Stafford v. Stafford*, 1 De G. & J. 202; *In re Saxon Life Assurance Society*, 2 J. & H. 412.

(1) See *Young v. Harris*, 65 L. T. 45.

(2) 45 & 46 Vict. c. 75.

(3) *Jones v. Higgins*, L. R. 2 Eq. 538; *Derbshire v. Home*, 3 De G. M. & G. 80; and see *Wilton v. Hill*, 25 L. J. Ch. 156; *Heath v. Wickham*, 5 L. R. Ir. 285.

(4) 51 & 52 Vict. c. 59.

(5) *Bond v. Hopkins*, 1 Sch. & Lef. 413.

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circumstances, therefore, a Court of Equity may say he is not entitled to enforce" (1). It may be stated as a general rule that, where there is a statutory period of limitation, delay for any length of time short of that will not be an absolute bar to the plaintiff's right to relief, except where by reason of such delay innocent persons have been allowed to acquire interests which would be prejudiced by such relief being granted (2). The distinction between the defence grounded on mere laches and that of acquiescence cannot perhaps be better stated generally than in the words of Lord Wensleydale. His lordship says in the case of *Archbold v. Scully* (3): "I take it that, where there is a Statute of Limitations, the objection of simple laches does not apply until the expiration of the time allowed by the statute. But acquiescence is a different thing; it means more than laches. If a party, who could object, lies by and knowingly permits another to incur an expense in doing an act under a belief that it would not be objected to, and so a kind of permission may be said to be given to another to alter his condition, he may be said to acquiesce; but the fact of simply neglecting to enforce a claim for the period which the law permits him to delay without losing his right, I conceive cannot be any equitable bar."

It is clear from all the cases referred to, that neither laches nor acquiescence can be imputed to one who is ignorant of the facts; it would seem to be a question of some doubt how far the same rule applies to ignorance of or mistake in law only (4). It is also clear from the

(1) Per Chelmsford, L. C. *Clarke v. Hart*, 6 H. L. 655. See *Rule v. Jewell*, 18 Ch. D. 660; *Garden Gully United Quartz Mining Co. v. McLister*, 1 App. Cas. 39; *Erlanger v. New Sombrero Phosphate Co.*

cases referred to, that laches cannot be imputed to persons under disability as infants or lunatics (1). A *feme covert* before the Married Women's Property Act, 1882 (2), was as to separate estate treated as a *feme sole*, except perhaps where she was restrained from anticipation (3). But now, apart from the provisions of the Married Women's Property Act, 1882, it is expressly enacted by the Trustee Act, 1888 (4), s. 8. suba. 1 (b), that "the statute (*sic*) shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation."

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Before the Judicature Act, 1873, in those cases in which a Court of Equity disregarded lapse of time, not only did it do so where it gave a direct remedy by its own decree, but also, where it put a question in a train of discussion at law by directing a trial to ascertain facts, and the law arising on those facts, it prevented the defendant taking advantage of lapse of time to defeat the plaintiff's claim in the same way as it prevented an outstanding term being set up against conscience for the same purpose (5). It is a principle of equity that a person will be relieved from injustice caused by the act or oversight of the Court, when the Court has been led into such act or oversight at the instance of the opposite side; therefore, before the Judicature Act, 1873, if a

Indirect
action of
Courts of
Equity in
disregard-
ing lapse
of time.

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circumstances, therefore, a Court of Equity may say he is not entitled to enforce" (1). It may be stated as a general rule that, where there is a statutory period of limitation, delay for any length of time short of that will not be an absolute bar to the plaintiff's right to relief, except where by reason of such delay innocent persons have been allowed to acquire interests which would be prejudiced by such relief being granted (2). The distinction between the defence grounded on mere laches and that of acquiescence cannot perhaps be better stated generally than in the words of Lord Wensleydale. His lordship says in the case of *Archbold v. Scully* (3): "I take it that, where there is a Statute of Limitations, the objection of simple laches does not apply until the expiration of the time allowed by the statute. But acquiescence is a different thing; it means more than laches. If a party, who could object, lies by and knowingly permits another to incur an expense in doing an act under a belief that it would not be objected to, and so a kind of permission may be said to be given to another to alter his condition, he may be said to acquiesce; but the fact of simply neglecting to enforce a claim for the period which the law permits him to delay without losing his right, I conceive cannot be any equitable bar."

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(1) Per Chelmsford, L. C. *Clarke v. Hart*, 6 H. L. 655. See *v. Jewell*, 18 Ch. D. 660; *Garden Gully United Quartz Mining v. McLister*, 1 App. Cas. 39; *Erlanger v. New Sombrero Phosphate*, 3 App. Cas. 1218.

(2) *Pickering v. Stamford*, 2 Ves. 272, 280; *Blake v. G.* Ch. D. 196.

(3) 9 H. L. 383.

(4) *Cockerell v. Cholr* 2 Russ. & M. 614; *M*

M. 424; McCarty v. Hare, 1 Russ. & M. 614.

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right must have been prosecuted, so that the remedy at law was lost, the Court gave him a remedy equivalent to that from which its interposition had debarred him (1). And the Court of Equity supplied any defect of title which had arisen in consequence of an injunction or other order of the Court (2). Nor was a party allowed to suffer injustice from the delay of the Court in exercising its jurisdiction. If a person within the statutory period of limitation instituted a suit in a Court of Equity, his right being properly enforceable there, and afterwards, when the statutory period had run out, was obliged in the course of the suit to bring an action or try an issue at law, the Court of Equity restrained the defendant from setting up a plea of the statute (3); and it was a good equitable replication to such a plea in such an action, that the suit had been commenced within the statutable period (4).

But a Court of Equity did not restrain a defendant from pleading the statute in an action at law, merely on the ground that the plaintiff had attempted to enforce the same claim in equity before his right of action was barred. If a plaintiff, who was in no way prevented from prosecuting his right by action at law, forbore to commence such action and tried instead to establish his claim by a suit in equity, and his bill was dismissed on the merits, equity, in the absence of special circumstances, did not interfere in his favour to prevent the statute being set up as a defence to his action at law (5).

But if persons fraudulently possessed themselves of documents on which was founded the title of the party

(1) Per Cottenham, L.C. *Brown v. Newall*, 2 Myl. & Cr. 571, 572; *Pulteney v. Warren*, 6 Ves. 73; *O'Donel v. Browne*, 1 Ball & B. 262; see *East India Co. v. Champion*, 11 Bligh. N. R. 187.

(2) *Fyson v. Pole*, 3 Y. & C. Exch. 266.

(3) *Sturt v. Mellish*, 2 Atk. 610, 615; *Sirdefield v. Price*, 2 Y. & J. 73.

(4) *Supple v. Cann*, 9 Ir. C. L. R. 1.

(5) *Craddock v. Marsh*, 1 Ch. R. 205; *Hurdret v. Calladon*, *Ib.* 214; *Lake v. Hayes*, 1 Atk. 281; see *Anon.* 1 Vern. 73, *contra*.

claiming against such persons, and he was therefore compelled to file a bill for discovery, equity did not allow the right of the party so kept in the dark to be prejudiced by the lapse of time while he was seeking discovery in equity (1). Where a suit in equity was brought to recover possession of property and the Court decided the question of title between two parties in favour of the one out of possession, a new right accrued at the date of the decree, although such decree did not provide for the transfer of possession to the party rightly entitled (2). And it has been held since the Judicature Act, 1873, that now, in law as in equity, an order of foreclosure absolute vests the ownership and beneficial title to the mortgaged land for the first time in the mortgagee, and that an action to recover possession of the mortgaged land will be in time if brought within twenty (now, since 37 & 38 Vict. c. 57, twelve) years of the foreclosure order (3).

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The power of restraining an action in the High Court by injunction was taken away by the Judicature Act, 1873, s. 24, subs. 5, but every matter of equity on which an injunction might have been obtained before the Act may be relied on by way of defence to the action. As the Chancery Division of the High Court of Justice has now jurisdiction to entertain almost any kind of action which might, before the Judicature Act, 1873, be brought in Courts of Common Law (4), many of the observations given above are now only of importance as illustrating the principles on which in the Queen's Bench Division of the High Court equitable defences or replies may be framed. Where creditors have entered into a binding agreement not to sue a debtor for a certain time, such an agreement could now be pleaded as an equitable defence

Equitable
defences.

(1) *Bond v. Hopkins*, 1 Sch. & Lef. 424.

(2) *Ib.* 436.

(3) *Pugh v. Heath*, 7 Ap. Cas. 235.

(4) See per James, L.J. *Warner v. Murdoch*, 4 Ch. D. at p. 752.

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to an action by the creditors, and the Statute of Limitations will not run during the pendency of the agreement. Thus where a deed between a debtor and his creditors provided that, in consideration of the debtor's life interest in property being given up for the payment of his debts, licence should be given to the debtor to carry on his business without suit or molestation to his person or property, and that if any of the creditors took proceedings to enforce their claims, their debts should be forfeited, it was held in a creditor's suit in equity before the Judicature Act, 1873, that the representative of the debtor could not take advantage under the statute of the creditors abstaining from suing during the debtor's life (1). So now, if a similar claim were brought, a defence of the statute would be well answered by a reply that there had been an agreement not to sue for a certain time, and that the action was commenced within the statutory period of limitation after the deferred time had expired.

(1) *O'Brien v. Osborne*, 10 Hare, 92; 16 Jur. 960. See *Iven v. Elwes*, 3 Drew. 25, and see *ante*, Part I. Ch. II. p. 40.

PART V.

LIMITATION OF RIGHTS TO REAL PROPERTY.

CHAPTER I.

GENERAL EFFECT OF 3 & 4 WM. IV. C. 27, AS
AMENDED BY 37 & 38 VICT. C. 57.

THE former part of this treatise had relation to the recovery of money. This part will relate to the recovery of land and such incorporeal hereditaments as are for the purposes of the limitations of actions on the same footing as land itself. The law on this subject at present depends on 3 & 4 Wm. IV. c. 27, and the amending Act, 37 & 38 Vict. c. 57, which substitutes twelve years as the period of limitation for twenty years, the time prescribed in the former Act.

Before the passing of the Act 3 & 4 Wm. IV. c. 27, the law on the subject was in a very confused and unsatisfactory state. A number of different sorts of actions were in use for the recovery of land and incorporeal hereditaments, and for these actions various periods of limitation had been provided by statute without any apparent regard to principle or uniformity. For the majority of actions in use, periods of limitation varying from sixty to thirty years were provided by 32 Hen. VIII. c. 2. Subsequently by 21 James I. c. 16 the period for a writ of

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State of
the law
before 3 & 4
Wm. IV. c.
27.

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formed on and for enforcing a right of entry was fixed at twenty years, subject to exceptions in cases of disability, and the possessory action of ejectment, which had in practice superseded all other remedies for the recovery of land, was limited to twenty years. By 4 Hen. VII. c. 24 a fine levied with proclamations by a person who had the actual seizin, whether by right or wrong, was a bar to persons who at the time of the fine or afterwards had immediate rights of entry, if they allowed a period of five years to elapse without asserting their claim.

A right of entry on land might not only be lost by lapse of time, but might be taken away by a variety of other means without any notice to the rightful claimant, so that the dispossessed owner of land might frequently have a right to recover it by a real action, when he had no right of entry. On the other hand, a right of entry might be preserved notwithstanding twenty years' adverse possession by a mere entry or claim made on the land by the claimant without any disturbance of the enjoyment of the land by the person in possession, so that, after the period for commencing a real action had elapsed, a claimant might still retain a right of entry.

The evils resulting from the old state of the law were clearly pointed out in the first report of the Real Property Commissioners; and the statute 3 & 4 Wm. IV. c. 27 was framed almost entirely upon their recommendations for the amendment of the law (1).

Effect of
the statute
3 & 4 Wm.
IV. c. 27,
as amended
by 37 & 38
Vict. c. 57.

The effect of this statute, as amended by 37 & 38 Vict. c. 57, is to allow but one sort of action for the recovery of land, to make this action applicable to all cases of legal claims, and to limit all persons to the period of twelve years for the prosecution of their rights or for taking peaceable possession of the land.

Claims to incorporeal hereditaments enforceable by distress are made subject to similar limitations, and the

(1) First Report of Real Property Commissioners (1829), pp. 39–41.

statute provides for the extinction of the title as well as the remedy of the claimant.

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By the 1st section of 37 & 38 Vict. c. 57, which is substituted for the 2nd section of 3 & 4 Wm. IV. c. 27, it is enacted that every right to recover any land or rent by entry, distress, or action shall be enforced within twelve years from the time when the right first accrued; and the 3rd, 4th, 6th, 7th, 8th, and 9th sections of 3 & 4 Wm. IV. c. 27, and the 2nd section of 37 & 38 Vict. c. 57, specify at what time in particular cases such right is to be deemed to accrue for the purposes of limitation; and it is amongst other things provided by 3 & 4 Wm. IV. c. 27 that no mere entry on land or continual claim made on or near it shall keep alive a right of entry which would otherwise be barred (1). All remedies for recovering land or rent which formerly existed in cases where the right of entry was gone are done away with by the abolition of real actions (2); at the same time, lest this should leave certain claimants without any remedy, it is enacted that no descent cast, discontinuance, or warranty, shall for the future defeat any right of entry (3); and, as fines were abolished by another Act of the same session of Parliament (3 & 4 Wm. IV. c. 74), no right of entry or action can now be taken away by any other means except lapse of time. By a subsequent section (4), when a sufficient period has elapsed to bar the right of entry, action or distress, the title in respect of which such right existed is simultaneously extinguished. This is the main scheme of the Acts, so far as regards legal rights to land and incorporeal heredita-

(1) 3 & 4 Wm. IV. c. 27, ss. 10 & 11.

(2) 3 & 4 Wm. IV. c. 27, s. 36. This section is repealed by the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59), but the repeal (see s. 4, subs. 4) is not to revive or restore any "usage, practice, procedure, or other matter or thing not existing or in force" at the passing of the Act (i.e. 15th Aug. 1879).

(3) 3 & 4 Wm. IV. c. 27, s. 39.

(4) Sect. 34.

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ments in general. Provision is made for an extension of the time in certain cases of disability, but in no case is the period of limitation to exceed thirty years (1). Limitations are provided for the claims of mortgagors where the mortgagees are in possession (2), and the claims of persons entitled to estates tail, or remainders expectant on such estates (3); the limitations in these cases correspond as nearly to those attached to other rights as the nature of the cases will allow. Suits in equity, which had not been expressly mentioned in previous Statutes of Limitations, were by the Act 3 & 4 Wm. IV. c. 27 limited to the same periods as actions at law, subject to exceptions in certain cases of fraud and trust (4).

No statutes before 3 & 4 Wm. IV. c. 27 had provided any limitation for claims to church property and advowsons; but the Act 3 & 4 Wm. IV. c. 27 provided special limitations for these cases (5), the enactments on the subject of advowsons being mainly founded on suggestions made by Mr. Justice Blackstone in his Commentaries (6).

Adverse
possession.

Before the passing of the statute 3 & 4 Wm. IV. c. 27, the question frequently arose whether the possession of a person holding land without title was "adverse" to the right of the lawful claimant, or in other words, whether such possession was in its character inconsistent with the title of the true owner. Upon the authorities it was almost impossible to say what would constitute such adverse possession, but the point was one of considerable importance, as it was settled that, unless the possession of a wrongful owner was adverse to the true title, the Statute of Limitations would not operate so as to bar the

(1) 37 & 38 Vict. c. 57, ss. 3 and 5.

(2) 37 & 38 Vict. c. 57, s. 7.

(3) 3 & 4 Wm. IV. c. 27, ss. 21 & 22, and 37 & 38 Vict. c. 57, s. 6.

(4) 3 & 4 Wm. IV. c. 27, ss. 24-27.

(5) Sects. 29-33.

(6) Book III. Ch. XVI.

lawful claimant's right of entry (1). The difficulty was removed by the Act 3 & 4 Wm. IV. c. 27, which put an end to the doctrine of adverse possession, and the only question under the Acts now in force is whether twelve years have elapsed since the claimant's right accrued, whatever be the nature of the present holder's possession (2).

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(1) See *Taylor v. Horde* and notes, 2 Sm. L. C. 9th ed. p. 632.

(2) *Nepean v. Doe*, 2 M. & W. 894, 911. 2 Sm. L. C. 9th ed. p. 628.

CHAPTER II.

SUBJECT-MATTER OF 3 & 4 WM. IV. C. 27, S. 2, AND OF
37 & 38 VICT. C. 57, S. 1.

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37 & 38
Vict. c. 57,
s. 1.

THE 1st section of 37 & 38 Vict. c. 57, which has been substituted for the 2nd section of 3 & 4 Wm. IV. c. 27, enacts as follows :—

“After the commencement of this Act (*i.e.* 1st Jan. 1879) no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or, if such right shall have not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same.”

The 24th section of 3 & 4 Wm. IV. c. 27 enacts as follows :—

3 & 4 Wm.
IV. c. 27,
s. 24.

“No person claiming any land or rent in equity shall bring any suit to recover the same but within the period during which by virtue of the provisions hereinbefore contained he might have made an entry or distress or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest or right in or to the same as he shall claim therein in equity.”

3 & 4 Wm.
IV. c. 27,
s. 34.

The 34th section of 3 & 4 Wm. IV. c. 27 enacts as follows :—

“At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any suit of *Quare impedit* or other action or suit, the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished.”

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The subject-matter of the 1st section of 37 & 38 Vict. c. 57 is defined by the 1st section of 3 & 4 Wm. IV. c. 27, the unrepealed provisions of which statute are to be construed along with the provisions of 37 & 38 Vict. c. 57.

Definition
clause of
3 & 4 Wm.
IV. c. 27
(s. 1).

“Land” by the 1st section of 3 & 4 Wm. IV. c. 27 is defined as extending to “manors, messuages, and all other corporeal hereditaments whatsoever and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole), and also to any share, estate or interest in them or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure.” The word “land” therefore cannot in these statutes include any incorporeal hereditaments except those tithes which do not belong to spiritual or eleemosynary corporations sole. Turnpike tolls are therefore not within the word land as used in these statutes (1). The case just referred to (1) arose on the 42nd section of 3 & 4 Wm. IV. c. 27 in a suit to recover interest on a sum of money charged by way of mortgage on such tolls, but the decision is clearly applicable to the whole Act and to 37 & 38 Vict. c. 57.

Land.

“Land,” as we have seen, includes those tithes which do not belong to a spiritual or eleemosynary corporation sole. Originally non-payment of tithes for any lapse of time would not render land tithe free, unless a legal origin for the exemption could be shown (2). To remedy this, an Act (2 & 3 Wm. IV. c. 100) was passed “for

Tithes.

(1) *Mellish v. Brooks*, 3 Beav. 22.

(2) See *Salkeld v. Johnston*, 1 McN. & G. 242; *Sheil v. Incorporated Society*, 10 Ir. Eq. R. 411; *Andrews v. Drever*, 3 Cl. & F. 314.

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shortening the time required in claims of *modus decimandi* or exemption from or discharge of tithes ;” and it has been settled, after some difference of opinion, that the provisions of the Act 2 & 3 Wm. IV. c. 100 are wholly unaffected by the Act 3 & 4 Wm. IV. c. 27, and that land in the latter Act, so far as it includes tithes, means estates in tithes only (1). Though the point was not raised in the cases referred to (1), it is quite clear that the recovery of penalties for not setting out tithes or of the value of tithes is also unaffected by 3 & 4 Wm. IV. c. 27. Such penalties were provided for by 53 Geo. III. c. 127, s. 5, which, though repealed by 50 & 51 Vict. c. 59, is still in force as to “tithes, offerings and compositions which have not been commuted or are otherwise still payable” (2). The result, therefore, is that the effect of time in discharging land from tithes by non-payment is regulated by 2 & 3 Wm. IV. c. 100. The effect of time between persons claiming as against one another estates or interests in tithes not belonging to a spiritual or eleemosynary corporation sole is regulated by 2 & 3 Wm. IV. c. 100 and 3 & 4 Wm. IV. c. 27, and in the case of tithes belonging to a spiritual or eleemosynary corporation sole is unaffected by any statute.

The commutation of tithes has made these questions now of little importance. How far tithe rent-charge is affected by 3 & 4 Wm. IV. c. 27 and the amending Act will be discussed presently.

“Land,” we have seen, includes in these statutes no incorporeal hereditaments except tithes not belonging to a spiritual or eleemosynary corporation sole. The incorporeal hereditaments which form the subject-matter of the

(1) *Dean of Ely v. Bliss*, 2 De G. M. & G. 459, on appeal reversing judgment of Lord Langdale, M. R. 5 Beav. 574, and see S. C. at law, *sub nom. Dean of Ely v. Cash*, 15 M. & W. 617; *Lord Shannon v. Hodder*, 2 Ir. L. R. 223; *Lord Shannon v. Stoughton*, 3 Ir. L. R. 521; *Sheil v. Incorporated Society*, 10 Ir. Eq. R. 411. See also *Bunbury v. Fuller* 9 Ex. 111.

(2) See schedule to 50 & 51 Vict. c. 59.

2nd section of 3 & 4 Wm. IV. c. 27, or the 1st section of 37 & 38 Vict. c. 57, are comprised in the word "rent," and "rent" in these sections does not mean rent reserved on leases for years by contract between the parties as the conventional equivalent for the right of occupation, but rent existing as an inheritance distinct from the land (1). Thus, although a different opinion seems at first to have prevailed in Ireland (2), a person entitled to the reversion expectant on the determination of a lease may distrain for the rent thereby reserved at any time during the existence of the lease, although no payment of rent has been made for more than twenty years (3), and this has been held to be also the same with regard to penal rents (4). The word "rent," as will be subsequently seen in discussing the various sections of 3 & 4 Wm. IV. c. 27, is used in many places in the sense of *rent reserved*, and frequently in close juxtaposition with *rent* meaning *rent existing as an inheritance distinct from the land*; but when it is used as denoting the subject-matter of the 2nd section of 3 & 4 Wm. IV. c. 27 (now the 1st section of 37 & 38 Vict. c. 57), it always means rent so existing as an inheritance and nothing else (5). In the 42nd section of 3 & 4 Wm. IV. c. 27 "rent," as we have seen, means both rent existing as an inheritance and rent reserved; hence, although no length of time will bar the right to recover rent reserved by lease, so long as the lease under which it is reserved exists, yet the amount of arrears recoverable is limited in the same way as the arrears of rent existing as an inheritance (6). It is

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Rent.

(1) *Grant v. Ellis*, 9 M. & W. 113. *Donegan v. Neill*, 16 L. R. Ir. 309.

(2) *Doe v. Bingham*, 3 Ir. L. R. 456.

(3) *Grant v. Ellis*, 9 M. & W. 113; *Baines v. Lumley*, 16 W. R. 674. And see judgments in *Lessee of Crosbie v. Sugrue*, 9 Ir. L. R. 17; *Lessee of Parks v. McLoughlin*, 1 Ir. C. L. R. 186; *Spratt v. Sherlock*, 3 Ir. C. L. R. 69.

(4) *Daly v. Lord Bloomfield*, 5 Ir. L. R. 65.

(5) See *Doe d. Angell v. Angell*, 9 Q. B. 328, 355.

(6) Part III. Ch. IV. p. 193.

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clear, and seems to have been never disputed, that the limitation prescribed by the 2nd section of 3 & 4 Wm. IV. c. 27 (now the 1st section of 37 & 38 Vict. c. 57) applies not only as between persons claiming an estate or interest in the rent as an inheritance, but also as between the owner of the rent and the owner of the land out of which it issues, so that a rent will, by the joint operation of the 2nd section of 3 & 4 Wm. IV. c. 27 or the 1st section of 37 & 38 Vict. c. 57, and the 34th section of 3 & 4 Wm. IV. c. 27, become extinguished by non-payment (1). The interpretation clause of 3 & 4 Wm. IV. c. 27 gives a most extended meaning to "rent," which, as defined, extends to "all heriots and all services and suits for which a distress may be made, and all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole)." "Any land" in this clause means any land in England or Ireland; an annuity charged on land in any other country is not governed by 3 & 4 Wm. IV. c. 27 or 37 & 38 Vict. c. 57 (2).

Heriots.

It was decided in *Owen v. De Beauvoir* (3), that under the provisions of the 3rd section of 3 & 4 Wm. IV. c. 27, which will be presently discussed, the time of limitation runs not from the first time of an instalment of rent becoming due and being unpaid, but from the last time at which an instalment of rent is paid. It is obvious that, if this principle were applied to heriots and rents payable at long intervals, these might be extinguished without any default at all, if it so happened that the intervals at which they became due were greater than twenty years; and in *Owen v. De Beauvoir* (4) doubts

(1) *Owen v. De Beauvoir*, 16 M. & W. 547; in error, 5 Exch. 166; *James v. Salter*, 2 Bingh. N. C. 505, and 3 Bingh. N. C. 544; *Manning v. Phelps*, 10 Exch. 59. See *Dower v. Dower*, 15 L. R. Ir. 264.

(2) *Pitt v. Lord Dacre*, 3 Ch. D. 295.

(3) 16 M. & W. 547, affirmed 5 Exch. 166.

(4) 16 M. & W. at p. 566.

were expressed how far the Act 3 & 4 Wm. IV. c. 27 applied to heriots and such rents. It had been held under the statute 32 Hen. VIII. c. 2 that neither heriots nor any accidental services which might not become due within the time limited by that Act were included within its provisions (1). But, as heriots are expressly mentioned in the interpretation clause of 3 & 4 Wm. IV. c. 27 as included in the word "rent," the framers of that Act must have intended that some kind of heriots should be affected by its provisions. Heriots are of two kinds—heriot custom and heriot service; heriot custom is due by the custom of a manor from every tenant, or every tenant of a certain class within the manor, while heriot service becomes due by a particular reservation in a grant or lease, or by prescription which is founded on a supposed grant (2). Heriot custom is said to lie in prender and not in render; it is not a service or in the nature of a rent, and cannot be recovered by distress. Heriot service is said to lie in render and is of the nature of a rent (2). Questions have arisen whether the Act 3 & 4 Wm. IV. c. 27 affects either or both of these classes of heriots (3).

The subject was fully discussed in the case of *Zouche v. Dalbiac* (4), and it was decided by the unanimous judgment of the Court of Exchequer that heriot custom was unaffected by the 2nd section of 3 & 4 Wm. IV. c. 27. It was not necessary for the purposes of that case to decide whether heriot service was within the Act; but it appears from the reasoning of the judgments delivered, that the judges were of opinion that the section did not apply to heriots of any kind. With reference to heriot service, if it be at all affected by the Act, it would seem that the

(1) *Bevil's Case*, 4 Co. 10b; Co. Lit. 115a

(2) 1 Scriv. Copyholds, pp. 370–375, 3rd ed. p. 438, 6th ed. p. 211;
2 Watk. Copyholds, 167, 4th ed. p. 101.

(3) Sugden on the Property Statutes, p. 18. *Chichester v. Hall*, 17 L. T. O. S. 121.

(4) L. R. 10 Exch. 172; 44 L. J. Exch. 109.

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right to recover a particular heriot by distress or action, must be barred in six years under the 42nd section of 3 & 4 Wm. IV. c. 27.

Reliefs.

Reliefs were held not to be within the statute 32 Hen. VIII. c. 2, because they are not services, but duties by reason of the tenure and service (1). For the same reason it appears that they are not included in the word "rent" in the 1st section of 3 & 4 Wm. IV. c. 27 as extended to "suits and services," and, as they are payable on events which occur at uncertain intervals, they can scarcely be said to be "periodical sums of money."

Quit-rents,
&c.

Quit-rents, whether arising out of freehold (2) or out of copyhold lands (3), are within the word "rent" as defined by 3 & 4 Wm. IV. c. 27, s. 1. So also are such services as cleaning the parish church, or ringing the church bell at stated times, these being services for the omission of which a distress might be made (4). The case last referred (4) to turned on the 8th section of 3 & 4 Wm. IV. c. 27, and decided only that such a service was a rent, the payment of which by the tenant of any land held on such terms would prevent the time of his possession from operating to bar the owner's claim. But it is clear on principle that, if a particular performance of such a service is a payment of rent for that purpose, the service is itself a rent, and therefore the inheritance in the benefit of such service would be within the meaning of the word "rent" in the 2nd section of 3 & 4 Wm. IV. c. 27 (now the 1st section of 37 & 38 Vict. c. 57).

Tenure be-
tween lord
and tenant

It is clear from the judgments in the *Earl of Chichester v. Hall* (5) that the extinction of any one service by the operation of the statute is no ground for presuming the

(1) Co. Lit. 115a; 2nd Inst. 95.

(2) *Owen v. De Beauvoir*, 16 M. & W. 547; in error, 5 Exch. 166; *Earl of Chichester v. Hall*, 17 L. T. O. S. 121.

(3) *Howitt v. Earl of Harrington*, W. N. 1893, p. 66; 37 Sol. Jo. 440.

(4) *Doe d. Edney v. Benham*, 7 Q. B. 976, and Co. Litt. 96b. See *Doe d. Robinson v. Hinde*, 2 M. & Rob. 441.

(5) 17 L. T. O. S. 121.

extinction of other services to which the same land is subject, or the extinction of the tenure to which the services are incident. But if for a very long period no rights of tenure whatever are exercised in respect of land held of a manor, and it is treated and dealt with adversely to the rights of the lord, an enfranchisement or release of tenure may be presumed (1). Wood, V.-C., held that no Statute of Limitations applies to such a case (2). But in the case of *Attorney-General v. Tomline* (3) the Court of Appeal held that, when a person held wrongful possession of copyhold land for the statutory period without making payments to or acknowledging the right of the lord, such person acquired a freehold title by virtue of 3 & 4 Wm. IV. c. 27. Where a lord had seized *quousque* copyhold lands, an action by the heir of the last tenant to compel the lord to admit him was held to be an action to recover land within the meaning of sect. 2 of 3 & 4 Wm. IV. c. 27 (now sect. 1 of 37 & 38 Vict. c. 57), and to be barred at the expiration of twenty (now twelve) years from the death of the last tenant (4). A seizure *quousque* by the lord of a manor is an entry within the meaning of sect. 2 of 3 & 4 Wm. IV. c. 27 or sect. 1 of 37 & 38 Vict. c. 57, and must, it seems, be made now within twelve years from the time when his right to issue the precept for seizure first accrued (5).

Seizure
quousque.

Tithe rent-charge, it must be recollected, did not exist at the time of the passing of 3 & 4 Wm. IV. c. 27, for the Tithe Commutation Act (6) was not passed till three years afterwards. But tithe rent-charge is a rent

Tithe rent-
charge.

(1) *Roe d. Johnson v. Ireland*, 11 East. 280. *In re Lidiard, &c.*, *Contract*, 42 Ch. D. 254.

(2) *Turner v. West Bromwich Union*, 9 W. R. 155.

(3) 15 Ch. D. 150.

(4) *Walters v. Webb*, L. R. 9 Eq. 83; 5 Ch. 531.

(5) *Scriven on Copyholds*, 6th ed. p. 117. *In re Lidiard, &c.*, *Contract*, 42 Ch. D. 254. See *Doe d. Tarrant v. Hellier*, 3 T. R. at p. 172. *Whitton v. Peacock*, 3 M. & K. at p. 335.

(6) 6 & 7 Wm. IV. c. 71.

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existing as an inheritance distinct from the land, and therefore, quite irrespective of any extended meaning given by the interpretation clause, is within the meaning of the word "rent" in the 2nd section of 3 & 4 Wm. IV. c. 27 or the 1st section of 37 & 38 Vict. c. 57. Therefore all tithe rent-charge, except that belonging to spiritual or eleemosynary corporations sole (1), is within the 2nd section of 3 & 4 Wm. IV. c. 27 or the 1st section of 37 & 38 Vict. c. 57, unless there is something in the Tithe Commutation Act preventing the operation of either of these sections. This was a point formerly open to doubt (2), but it is now settled that, not only does the Act 3 & 4 Wm. IV. c. 27 or 37 & 38 Vict. c. 57 apply as between rival claimants to the tithe rent-charge in lay hands, but such tithe rent-charge is liable to be extinguished by non-payment after a lapse of twenty (now twelve) years (3). The money tithes payable on houses in the City of London by 37 Hen. VIII. c. 12 have also been held to be "rent" within the 2nd section of 3 & 4 Wm. IV. c. 27 (now the 1st section of 37 & 38 Vict. c. 57), and the right to such tithes in lay hands is now barred by non-payment for twelve years (4).

Dower.

An action brought by a widow to obtain an assignment of dower is an action to recover land within the meaning of the 2nd section of 3 & 4 Wm. IV. c. 27 or the 1st section of 37 & 38 Vict. c. 57, and consequently cannot now be maintained more than twelve years after her right accrued. And as suits in equity were by the 24th section of 3 & 4 Wm. IV. c. 27 made subject to the same limitation as actions at law, a widow cannot, when that period has elapsed, take any proceedings in equity for that purpose (5).

(1) See *post*, Part V. Ch. XXIII.

(2) *Sheil v. Incorporated Society*, 10 Ir. Eq. R. 411.

(3) *Irish Land Commission v. Grant*, 10 App. Cas. 14. See *Irish Land Commission v. Junkin*, 24 L. R. Ir. 40.

(4) *Payne v. Esdaile*, 13 App. Cas. 613.

(5) *Marshall v. Smith*, 34 L. J. Ch. 189; 10 Jur. N. S. 1174.

“Person” in the definition clause of 3 & 4 Wm. IV. c. 27 includes “class of persons,” and it has been held that the poor of a parish constitute a “class of persons” within the meaning of that clause (1).

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“Person.”

(1) *President of St. Mary Magdalen, Oxford v. Attorney-General*,
6 H. L. C. 189.

CHAPTER III.

WHEN TIME BEGINS TO RUN IN CASES OF DISCONTINU-
ANCE OF POSSESSION.PART V.
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1st section
of 37 & 38
Vict. c. 57,
includes all
cases.

THE general effect of the 1st section of 37 & 38 Vict. c. 57 (which has been substituted for the 2nd section of 3 & 4 Wm. IV. c. 27) is to take away all remedies for the recovery of land or rent at the end of twelve years after the right to enforce such remedy accrued. The 3rd, 4th, 6th, 7th, 8th, and 9th sections of 3 & 4 Wm. IV. c. 27 and the 2nd section of 37 & 38 Vict. c. 57 define at what time in certain cases the right shall be deemed to have accrued. The object of the 3rd section of 3 & 4 Wm. IV. c. 27 is not to cut down or limit the meaning of the 2nd section of that Act (now the 1st section of 37 & 38 Vict. c. 57), or even to give a complete explanation of the terms used in that section, but to explain and give a construction to the enactment contained therein as to “the time at which the right to make an entry or distress or to bring an action shall be deemed to have first accrued” in those cases only in which doubt or difficulty might occur (1).

3rd section
of 3 & 4
Wm. IV.
c. 27.

The 3rd section of 3 & 4 Wm. IV. c. 27 is as follows :
“In the construction of this Act the right to make an entry or distress or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned ; (that is to say)—

(1) *James v. Salter*, 3 Bingh. N. C. at p. 553. *Governors of Magdalen Hospital v. Knotts*, 8 Ch. D. at p. 727. *Pugh v. Heath*, 7 App. Cas. at p. 238. *Irish Land Commission v. Junkin*, 24 L. R. Ir. 40.

"1. When the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received ;

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Five
branches
of the 3rd
section of
3 & 4 Wm
IV. c. 27.

"2. And when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death ;

"3. And when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument ;

"4. And when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first

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accrued at the time at which such estate or interest became an estate or interest in possession ;

“5. And when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken.”

This section naturally divides itself into five branches, as numbered above, each referring to a particular class of circumstances.

First
branch.

The first branch, as Parke, B., has laid down, provides for the case both of land of which a person has been dispossessed and of rent which a person has ceased to receive, and must be read with reference to such land and rent, *reddendo singula singulis*, as fixing the actual moment of dispossession or discontinuance of possession in the case of land, and the last actual payment of rent in the case of a person ceasing to receive rent, as the point from which the period of limitation is to begin (1).

Discon-
tinuance of
possession.

It is clear that this is the correct view, but it is obvious that the learned judge should after the words, “discontinuance of possession,” have added the words, “or receipt of profits,” as these last words are used in the Act and can only refer to land. The first case, therefore, to be considered is where an owner of land has been dispossessed or has discontinued the possession or receipt of the profits of the land. As to this the provision of the statute is as follows :—“When the person claiming such land or some person through whom he claims shall in respect of the estate or interest claimed have been in possession or in receipt of the profits of such land, and shall while entitled thereto have been dispossessed or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the

(1) *Owen v. De Beauvoir*, 16 M. & W. 564.

time of such dispossession or discontinuance of possession or at the last time at which any such profits were so received."

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Mere discontinuance of possession is not sufficient; there must be not only discontinuance of possession on the part of the owner but actual exclusive possession for the statutory period by some one else to be protected (1).

What is
discon-
tinuance of
possession
of land.

It has been held by the Privy Council that, if a person enter on the land of another and then, before he has acquired a title under the statute, abandons possession and no one else then takes possession, the statute has no operation, and the rightful owner is in the same position as if no intrusion had taken place (2).

Discontinuance under the statute must be the quitting of possession by a person then entitled to such possession. It was decided in *Rimington v. Cannon* (3) that the discontinuance of an estate tail worked by the tortious feoffment of a tenant in tail was not a discontinuance of possession by the person through whom the issue in tail claimed within the meaning of the 3rd section of 3 & 4 Wm. IV. c. 27 so as to make the period of limitation begin to run against such issue from the time of such feoffment. The general principle of the Act, it was said, was, that a person who had a right to enter should be barred if he does not exercise that right in a certain time, not that those should be barred who cannot exercise a right of entry. *Contra non valentem agere non currit præscriptio*. What may amount in any particular case to discontinuance of possession on one side and commencement of possession on the other must depend very much on the nature of the property and the particular circumstances.

(1) *McDonnell v. McKinty*, 10 Ir. L. R. 514; *Smith v. Lloyd*, 9 Exch. 562, 572; 23 L. J. Exch. 194; *Agency Co. v. Short*, 13 App. Cas. 793; *Gibson v. Wise*, 35 W. R. 409.

(2) *Agency Co. v. Short*, 13 App. Cas. 793; see *Willis v. Earl Howe*, 9 Times L. R. at p. 416; 41 W. R. 435.

(3) 12 C. B. 18, 33; 22 L. J. C. P. 153. See *Earl of Abergavenny v. Brace*, L. R. 7 Exch. 145; *Bobbett v. S. E. Ry. Co.* 9 Q. B. D. 424.

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of road.

This question was discussed in the Irish case of *Tottenham v. Byrne* (1). In that case the public had a right to use a well, situated in a field near a highway; a road over which the public had a right of way led from the highway to the well between two walls. The owner of the field was originally the owner of the soil of the road and of the town-land in which both road and field were situate; he sold part of the town-land, including the field, but reserved the soil of the road. It was essential to the convenience of the inhabitants of the town-land that they should have the use of the well and the road to it; the right of the public over the road made it impossible for the owner of the soil of the road to have any beneficial enjoyment of it, except so far as the user of it was necessary to the full enjoyment of the rest of the town-land which was his property, and it was clear that for that reason he had reserved the soil of the road. The purchaser of the field pulled the walls down and threw the road into the adjoining field and also built a wall across the road at its junction with the highway, leaving a stile for the use of persons going to and from the well. The public, including the inhabitants of the town-land, continued to use the well and the road to it. Subsequently the defendant who claimed through the purchaser further obstructed the road. For this the plaintiff who claimed under the vendor brought an action. One of the questions raised in this action was whether the soil of the road was vested in the plaintiff or in the defendant. Pigot, C.B., agreeing with the ruling of Christian, J., at *Nisi Prius*, held that the soil was vested in the plaintiff, no matter at what time the walls were thrown down and the new wall built across the end of the road, because, notwithstanding those acts of the defendant, as the inhabitants of the town-land had continued to use the road, the plaintiff had had all the enjoyment of the road

(1) 12 Ir. C. L. R. 376.

contemplated by the reservation, and indeed all that was possible, and therefore could not be considered to have been dispossessed by those acts. Deasy and Fitzgerald, BB., however, held that the question of ownership depended on the date of the throwing down of the old walls and building of the new one; they observed that, although the right of way existed, it was competent for the owner of the soil to deal with the road in any way that did not interfere with such right, that, so far as that could be done, it had been done by the defendant and not by the plaintiff, that the acts of pulling down and building the walls were evidence of possession by the defendant, so far as the road was capable of possession, that after these acts the original owner of the soil of the road might on the authority of *Goodtitle v. Alker* (1) have brought ejectment against the defendant and that this necessarily involved possession by the defendant and the dispossession of the plaintiff, and that therefore time began to run against the plaintiff from the date of the doing of such acts. The judgment of the Court of Exchequer was reversed in the Exchequer Chamber (2), but the case as decided in the Exchequer Chamber is not reported, but it seems to have followed the *ratio decidendi* of *Pigot, C.B.*, in the court below.

The case of *Tottenham v. Byrne*, as decided in the Exchequer Chamber, was followed in a similar case in 1877 (3) by the Irish Court of Exchequer. In that case an action of trespass was brought by the plaintiff who held premises adjoining the *locus in quo* under a lease for lives made by the defendant's predecessors, in which the demised premises were described as bounded on one side by an intended new street; the *locus in quo* was the site of this intended new street which was never made, but the defendant's predecessors alone had such an estate

(1) 1 Burr. 133.

(2) See *Reilly v. Thompson*, 11 Ir. R. C. L. pp. 247, 251.

(3) *Reilly v. Thompson*, 11 Ir. R. C. L. 238.

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as enabled them to dedicate it to the public. The plaintiff claimed to have acquired by the statute a title to the *locus in quo*, but there was evidence of a continuous user of a public way on foot over it during the whole of the statutory period. The jury found a verdict for the plaintiff. The Court of Exchequer held that the user of the road by the public was sufficient to preserve the title of the defendant's predecessors and those claiming through them, and would prevent the operation of sects. 2, 3, and 34 of 3 & 4 Wm. IV. c. 27, but that it was a question for the jury whether the dedication originally intended had in fact been made by the defendant's predecessors; the Court set aside the verdict as being against the weight of evidence, the legitimate conclusion from the whole evidence being that there was some dedication, and that, as the defendants' predecessors alone had such an estate as would enable them to dedicate, the jury ought to have attributed the user of the way to the dedication originally intended as modified and not abandoned. The true test, it seems, in every case, whether a rightful owner has been dispossessed or not, is whether ejectment will lie at his suit against another person.

Where land is not capable of use and enjoyment, there can be no discontinuance by mere absence of use and enjoyment (1). To constitute dispossession acts must be done which are inconsistent with the enjoyment of the soil by the person entitled for the purposes for which he intended to use it (2). In the case of *Leigh v. Jack* (3) a piece of land had been marked out as a street and the plaintiff intended to dedicate it to the public; within twenty years before action the plaintiff had repaired a gate at one end of the intended street; more than twenty years before action the defendant placed materials on the piece of land and blocked it up and finally four years

(1) *Per* Cotton, L.J. *Leigh v. Jack*, 5 Exch. D. at p. 274.

(2) *Per* Bramwell, L.J. *Leigh v. Jack*, 5 Exch. D. at p. 273.

(3) 5 Exch. D. 264.

before action enclosed a portion of it. In an action of ejectment it was held that the acts done by the defendant more than twenty years before action did not amount to a dispossession, and that they were not inconsistent with the enjoyment of the soil for the purposes for which the owner intended to use it.

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In the case of *Norton v. The London and North-Western Railway Company* (1), the defendants had purchased part of a field and made a hedge on it in such a position as to leave a strip of the land purchased outside the hedge and open to the rest of the field. This strip was cultivated by the owners of the field as part of the field for more than twenty years before action, and the defendants did nothing to retain possession of the strip except sending men on it to clip the hedge. It was held that the owner of the rest of the field had been in sufficient possession of the strip of land and that the defendants' title to it was extinguished by the statute. This case must be treated as overruling *Searby v. The Tottenham Railway Company* (2).

Possession
by cultivation.

In *Smith v. Stocks* (3), a gravel pit had been allotted to surveyors of highways under a local Act; no gravel had been taken after 1837, and the surveyors took no steps to assert their right to the pit till 1863; in 1837 the tenant of the land, in which a part of the pit was situated, filled up that part of the pit and cultivated the surface from that time till 1863; in 1839 the tenant of the land adjoining the remaining portion of the pit ploughed up this remaining portion, and from that time till 1863 this portion also was cultivated. Both the tenants who so cultivated the surface of the pit held their land of the predecessor in title of the plaintiff; in 1863 the surveyor of highways entered upon the plaintiff's land and commenced digging for gravel; it was held in

(1) 13 Ch. D. 268.

(2) L. R. 5 Eq. 409.

(3) 38 L. J. Q. B. 306.

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an action of trespass that the plaintiff and his predecessor in title had through their tenants been in possession of the two parts of the pit since 1837 and 1839 respectively, and that the title of the surveyor of highways was barred by statute.

In the case of *Seddon v. Smith* (1) a long strip of land, parcel of the waste of a manor, had been set out under an Inclosure Act as an occupation road leading to land of the plaintiff. The soil of the road with the minerals therein remained the property of the lord of the manor. The plaintiff and his predecessors had for more than twenty years before action ploughed up and used as part of their land three quarters of the breadth of the strip, but the remaining quarter continued to be used as a road. It was held by the Court of Appeal that such user of three quarters of the road was sufficient to give the plaintiff a title under the statute not only to the surface but also to the minerals, but that the soil of the other quarter which had been left open and used as a road remained the property of the lord of the manor.

Possession
of wall.

In the case of *Phillipson v. Gibbon* (2), in the wall of a house there was an inscription stating that the wall was the property of the East India Company and was erected at their sole charge in 1776. In 1831 a tenant of the house had rebuilt the wall and reinserted the stone; after 1831 no acknowledgment of the title of the East India Company had ever been given by any person in possession of the house; there was also in the wall a watch-box, the key to the door of which was at the time of action brought in possession of persons who claimed under the East India Company. The plaintiffs sold the house to the defendant, and in an action for specific performance of the contract of sale brought in 1869, the Court of Appeal held that there had been no abandonment of the possession of the wall by the East India

(1) 36 L. T. 168. Williams on Commons, 152.

(2) L. R. 6 Ch. 428.

Company, that the Statute of Limitations had no application, and that the plaintiffs had failed to show a good title to the whole of the property.

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In the case of *Bobbett v. The South-Eastern Railway Co.* (1), the plaintiff, with the permission of the defendants' manager, occupied as a coal-wharf in 1863 a piece of land belonging to the defendants, which was near their station and siding and inside a fence which divided their land from the high road; in 1865 the plaintiff built an office on the land, and carried on business there till 1881; no rent was ever paid by the plaintiff; the defendants' servants occasionally repaired a fence between the coal-wharf and the siding; in 1881 the defendants gave the plaintiff notice that they wished to take a portion of the wharf "which you now occupy," but that they did not ask him to give up "entire possession." The plaintiff wrote back asking that some one might meet him at the station and decide "where I am to have my wharf." The parties could not agree, and the defendants made a new siding on the ground in dispute, and the plaintiff brought an action of trespass against the defendants, and also claimed to recover possession of the land. Denman, J., left to the jury the question whether the plaintiff had possession of the premises to the exclusion of the defendants; the jury could not agree and were discharged, and Denman, J., gave judgment for the defendants, holding on these facts that there was no reasonable evidence on which a jury could find that the defendants had been out of possession since 1863, by reason of an exclusive possession of the plaintiff (2).

Possession
of railway
land.

Denman, J., also held in this case that the mere fact that land was taken under the Lands Clauses Act, 1845, for the purposes of an undertaking and was not superfluous land, would not prevent a person who has exclusive

(1) 9 Q. B. D. 424.

(2) This decision was affirmed by the Court of Appeal, W. N. 1882, p. 92.

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possession of such land for the statutory period from becoming entitled to the land by the operation of the Statute of Limitations (1).

Land vested
in corpora-
tions.
Restriction
on aliena-
tion.

Where by a local Act a corporation was prohibited from letting or selling any part of an estate without the consent of the vestry, and certain premises which were part of this estate had been in the exclusive occupation of certain persons for twelve years, without any payment of rent to the corporation or acknowledgment of their title, it was held that the title of the corporation was barred by the statute, and that the restriction on sale did not prevent the operation of the statute (2).

Occupation
of space
under-
ground.

The exclusive occupation of a space underground, though without the knowledge of the owner of the land, will give a good title under the statute. Thus, in a case arising under 3 & 4 Wm. IV. c. 27, s. 2, where a cavity under the defendant's premises had been used for twenty years as a cellar for the plaintiff's house, it was held that the plaintiff had acquired a good title to the cellar (3).

Possession
of mines.

These questions have very often arisen in the case of mines, where, while there has been no actual user of the mines by the owner, another person has been in possession of the surface. Where an owner of land sells it, reserving the minerals, it is clear that at the time of such sale and giving up possession of the surface, such owner remains in possession of the mines in the same way as if he had not sold the surface, and that non-user is of itself no abandonment of possession, because mines frequently remain unworked, and the reservation of them in a sale of the surface is often with the express intention of not working them for a long period; consequently no matter how long such mines remain unworked by the owner and those claiming under him, their right is unbarred, so

(1) See *Norton v. L. & N. W. Railway Co.*, 13 Ch. Div. 268.

(2) *Mayor, &c., of Brighton v. Guardians, &c., of Brighton*, 5 C. P. D. 368.

(3) *Rains v. Buxton*, 49 L. J. Ch. 473.

long as the mines are not worked by any one else (1). Of course, if the owner of the surface or a stranger work the minerals, that amounts to an actual possession by the person working them, and a dispossession of the owner of the minerals. Thus, in an action of ejectment relating to mines, where the plaintiff, who as the lord of the manor was entitled to the mines, had been in actual possession of the manor, but the defendants had been in possession of the mines for more than twenty years, it was held under 21 Jac. I. c. 16 that the lord's right of action was barred, as there had been no entry within twenty years upon the mines, which were a distinct possession and might be a distinct inheritance (2). But it does not follow that persons, by working part of mines or opening a particular quarry, have possession of the continuous field of minerals or quarries of which the part worked forms a portion (3). In the case of the *Earl of Dartmouth v. Spittle* (4), where the defendant more than twenty years before action had worked part of the plaintiff's coal, it was held that in the circumstances of the case the defendant had not acquired any right by statute to the mines, his acts not amounting to such a possession as would bar the owner's right. The mere taking of minerals wrongfully does not amount to possession of the mine. Where mines are dissevered from the surface and held by a different owner, no presumption of possession of the whole of the mine arises from the fact of possession of a part (5). It is, it would seem, in each case a question of fact to what extent by actual working of the mines

(1) *McDonnell v. McKinty*, 10 Ir. L. R. 514; *Smith v. Lloyd*, 9 Exch. 562; 23 L. J. Exch. 194; *Keyse v. Powell*, 2 E. & B. 132; 22 L. J. Q. B. 305; see also *Seaman v. Vaudrey*, 16 Ves. 390; *Adair v. Shaftoe*, cited by Lord Eldon, L. C., in *Norway v. Rowe*, 19 Ves. 156; *Hodgkinson v. Fletcher*, 3 Doug. 31; *Low Moor Co. v. Stanley Coal Co.*, 33 L. T. N. S. 436; 34 L. T. N. S. 186.

(2) *Rich d. Lord Cullen v. Johnson*, 2 Stra. 1142.

(3) *McDonnell v. McKinty*, 10 Ir. L. R. 514.

(4) 24 L. T. N. S. 67.

(5) *Per Pigot, B. The Earl of Dartmouth v. Spittle*, 24 L. T. N. S. p. 68. See *Ashton v. Stock*, 6 Ch. D. 719.

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*Keyse v.
Powell.*

possession has been gained on the one side and lost on the other.

The case of *Keyse v. Powell* (1), though it refers more particularly to the third branch of this section, should be mentioned here as bearing on the first branch. In 1821 a copyholder of inheritance granted a lease of mines for ninety-nine years to two persons through whom the defendant claimed. The mines were not worked by any one till 1847, when the defendant began to work them, and the plaintiff, the then copyholder, claiming under the grantor of the lease, brought an action of trespass; the defendant pleaded that the minerals were not the plaintiff's, and also justified the entry under the lease. To this last plea the plaintiff replied that the defendant's right of entry did not accrue within twenty years, and was barred by the statute. It appeared that at the date of the lease one of the grantees was in possession of the surface under a prior demise from the copyholder without any reservation of the minerals. It was held that the possession of minerals is in a copyholder, that, by virtue of the prior demise and possession under it, the grantee last referred to acquired possession of the minerals with the surface, and that such possession enured so as to put both himself and the other grantee into possession of the mines under the lease of 1821, so that that lease was not a mere *interesse termini*; and that, notwithstanding the determination of the prior demise, the parties claiming under the lease of 1821 remained in possession of the mines continuously, although they had not worked them. The defendant was therefore held to be entitled to the verdict both on the plea denying the plaintiff's property, and on the replication setting up the Statute of Limitations in answer to the plea justifying the defendant's entry under the lease.

It will be seen that in all these cases the possession, which, it was held, could not be discontinued by non-user

(1) 2 E. & B. 132; 22 L. J. Q. B. 305.

merely, was commenced by possession of the surface before the severance of the minerals therefrom. The case is not necessarily the same where the owners of both surface and minerals, being in possession of both by means of possession of the surface, alien the minerals, but retain possession of the surface, or where there are several adverse claimants to minerals severed from the surface. These cases will be discussed below (1).

If a person enters into possession of land under a lease which is absolutely void and pays no rent, this is a discontinuance by the owner of the land, and the statute will run against the owner from the time that such possession begins (2).

Possession
under void
lease.

Where a lord of a manor seizes copyholds *quousque*, such a seizure is a dispossession of the person entitled to be admitted, and the statute runs in favour of the lord from the time of the seizure (3).

Seizure
quousque.

In actions for the recovery of possession of land, which is the name now used for actions which were formerly called actions of ejectment, the plaintiff must recover by the strength of his own title and not by the weakness of that of the defendant, and must both allege by his pleading (4), and prove, not merely a right of property but a possessory title unbarred by the Statute of Limitations (5); if he does not both allege and prove this, he must fail, even though he may prove that the defendant has no title to the land. In *Poole v. Griffith* (6), the majority of the judges, seven in number, in the Exchequer Chamber in Ireland, seemed to have held that the execution of a lease by a person through whom the

Burden of
proof.

(1) Part V. Ch. IV.

(2) *Governors of Magdalen Hospital v. Knotts*, 4 App. Cas. 324.

(3) *Walters v. Webb*, L. R. 9 Eq. 83; 5 Ch. 531.

(4) *Dawkins v. Lord Penrhyn*, 4 App. Cas. 51. *Dunford v. McAnulty*, 8 App. Cas. 456.

(5) *Taylor v. Horde*, 1 Burr. 60, 119, 2 Sm. L. C. 9th ed. 632, 719; *Nepean v. Doe d. Knight*, 2 M. & W. 894, 2 Sm. L. C. 9th ed. 610; and see Cole on Ejectment, 6; and judgments of O'Brien, J., and Pigot, C.B., in *Poole v. Griffith*, 15 Ir. C. L. R. 271, 286.

(6) 15 Ir. C. L. R. 239; in error *ib.* 277.

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plaintiff claimed and continuous payment of rent under the lease, afforded some presumptive evidence both that the lessee at the date of the lease was put into actual possession and that he continued in such possession; Pigot, C.B., and two other judges dissented from this view.

In the *Earl of Miltown v. Goodman* (1), the plaintiff's predecessor in title in 1741 demised a house to the defendant's predecessor in title for lives renewable for ever; the lease was renewed several times, but it was contended on behalf of the defendant that the last renewal was in 1800, and that the last life under it expired in 1852, and that since then no rent had been paid, and that he had been in possession for twenty years. To meet this, the plaintiff gave in evidence an instrument purporting to be a renewal dated in 1806, the life under which did not end till 1862, within twenty years of action; the lease and the counterpart purported to be signed, sealed, and delivered by the lessor, but neither was executed by the lessee, and both were produced out of the custody of the plaintiff. Keogh, J., directed a verdict for the defendant, and the Court of Common Pleas refused to disturb the verdict, holding that the most that the plaintiff was entitled to was to have the question as to the fact of the "delivery" of the deed submitted to the jury, and that he was not entitled, as he contended, to a direction in his favour.

Meaning of
"profits of
land."

It is laid down by Lord St. Leonards that the expression "profits of land" in the 3rd section of 3 & 4 Wm. IV. c. 27 does not mean "rent reserved." Tenants at will (2), tenants from year to year without leases in writing (3), and tenants under leases in writing (4), are all spoken of as being *as such tenants* in possession or in

(1) 10 Ir. R. C. L. 27.

(2) 3 & 4 Wm. IV. c. 27, s. 7.

(3) *Ib.* s. 8.

(4) *Ib.* s. 9.

receipt of the profits of land, and it is provided by the 35th section that the receipt of the rent payable by a lessee shall, as against such lessee or any person claiming under him, be deemed to be the receipt of the profits of the land for the purposes of the Act. "It is clear," says Lord St. Leonards, "that the expression 'in receipt of the profits of any land' is used in the Act, in conjunction with the words 'in possession' of the land, to denote not the receipt of rent from a tenant, but the receipt of the actual proceeds of the land; and they were no doubt introduced to prevent any question arising when the owner, although he received the proceeds, did not actually occupy the land" (1). This would be the case where an owner does not live on an estate, but farms it by a bailiff. It may be, however, that in the 12th section and the 28th section (now 37 & 38 Vict. c. 57, s. 7) the expression "receipt of the profits" may include the receipt of rents reserved from tenants (2).

The next case to be considered is where an owner of rent has discontinued the receipt of such rent. In this case the provisions of the statutes are as follows:—
"When the person claiming such rent or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in receipt of such rent, and shall, while entitled thereto, have discontinued such receipt, then such right shall be deemed to have first accrued at the last time at which any such rent was so received." Rent here, it should be remembered, means rent as an inheritance and not rent reserved (3). In the case of *Owen v. De Beauvoir* (4), which was an action of replevin, the defendant on the 13th May, 1845, had distrained for six years' arrears of quit-rent payable yearly at Michaelmas out of certain lands held of a

Discontin-
uance of
receipt of
rent.

(1) Lord St. Leonards' Prop. Stat. 47; see *Grant v. Ellis*, 9 M. & W. 128.

(2) See *post*, Part V. Ch. XII. and XXI.

(3) See *ante*, Part V. Ch. II.

(4) 16 M. & W. 547; in error, 5 Exch. 166.

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manor belonging to him. The last payment in respect of the quit-rent had been made on the 15th January, 1825, when all arrears due up to Michaelmas, 1824, had been paid. It was held both in the Court of Exchequer and in the Exchequer Chamber, that the first branch of the 3rd section of 3 & 4 Wm. IV. c. 27 must be read *reddendo singula singulis*, and that in the case of rent the day of the last payment is fixed as the time at which the right to make an entry or distress or to bring an action first accrued to the person making or bringing the same, although this would make the time begin to run before any right to make an entry or distress or to bring an action has actually accrued; consequently it was held that the rent was extinguished on the 15th January, 1845, before the distress was made; it was further held that the right to the rent having been extinguished before the distress, the distress was unlawful.

Extinguish-
ment of
rent.

As Parke, B., in *Owen v. De Beauvoir* (1), gave as the reason why the distress could not be made that a distress made subsequent to the extinguishment of rent was unlawful, and as Patteson, J., in the same case, in delivering the judgment of the Court in the Exchequer Chamber (2), observed that the defence was that the tenure alleged in the avowry was extinguished before the time of the distress, it would seem that the reason in their minds for holding that the distress could not be made, was that the "rent service" having become extinguished, no tenure in respect of the rent existed at the time of the distress. In the case of a rent-charge or rent-seck, where the right of distress depends on either contract or statute (3), and not on tenure, it might possibly be argued that this reasoning does not apply; but even assuming that it does not, yet it seems that, in every case where a rent is extinguished

(1) 16 M. & W. at p. 568.

(2) *De Beauvoir v. Owen*, 5 Exch. p. 177.

(3) See 4 Geo. II. c. 28, s. 5, and Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 44.

by the operation of the statute, no arrears accruing due before the day on which such extinguishment takes effect can be recovered after that day, because the rent is extinguished as from the day on which the statute began to run, not as from the last day of the statutory period of limitation.

— In the case of *Adnam v. The Earl of Sandwich* (1), it was decided that, to constitute a discontinuance of the receipt of rent, there must be an omission by the person entitled by not applying for the rent, or by neglecting to enforce his remedies with knowledge that payment has not been made. In that case the owner of lands subject to a fee-farm rent had sold the lands in 1812, but he and his successors in title continued to pay the fee-farm rent up to 1872, when they refused to pay, on the ground that the previous payments had been made in error and that they had no interest in the land; it was held that the statute had not barred the right of the person entitled to the fee-farm rent, first, because there had been no discontinuance of receipt of rent, and secondly, because it was to be presumed that on the conveyance of the lands in 1812 there had been an arrangement that the vendor should indemnify the purchaser against the rent, and therefore that the payments from 1812 to 1872 were made by the persons liable.

It has been held in Ireland that a civil bill decree for arrears of tithe rent-charge obtained within twelve years before action, although unsatisfied, and although no payment of the rent-charge has been made for more than twelve years before action, prevents the tithe rent-charge from being extinguished by the statute. The ground of the decision seems to have been that a fresh right to receive the rent-charge accrued on the judgment, and that the twelve years began to run afresh from that time. This was held to be a case where a right may first accrue

(1) 2 Q. B. D. 485.

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within the meaning of the 1st section of 37 & 38 Vict. c. 57 (formerly the 2nd section of 3 & 4 Wm. IV. c. 27), although not coming within the 3rd section of 3 & 4 Wm. IV. c. 27; in such a case, if the 3rd section were an exhaustive definition, the right would be extinguished (1).

Rent-charge.

Where land subject to a rent-charge is divided and comes into the occupation of different persons, and the rent-charge is paid by the occupier of part of the land and the occupier of another part of the land does not make any payment or acknowledgment of and is not distrained on for the rent-charge for more than twenty (now twelve) years, nevertheless, as a rent-charge is entire and issues out of all and every portion of the premises charged, there is in such a case no dispossession of the owner of the rent-charge as regards the part in respect of which no claim has been made, and the statute does not run against his right to distrain for the rent-charge on that part (2).

(1) *Irish Land Commission v. Junkin*, 24 L. R. Ir. 40.

(2) *Woodcock v. Titterton*, 12 W. R. 865.

CHAPTER IV.

COMMENCEMENT OF WRONGFUL POSSESSION ON DEATH OF OR ALIENATION BY THE RIGHTFUL OWNER.

*(Second and Third Branches of 3rd section of 3 & 4
Wm. IV. c. 27.)*

THE second and third branches of the 3rd section of 3 & 4 Wm. IV. c. 27 provide for cases where rightful possession has been discontinued upon the death of or alienation by the person last rightfully in possession. These branches are as follows—

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2. “When the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death ; and

Second
and third
branches of
the 3rd
section of
3 & 4 Wm.
IV. c. 27.

3. “When the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed or otherwise assured by any instrument (other than a will) to him or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom

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*James v.
Salter.*

he claims, became entitled to such possession or receipt by virtue of such instrument."

The leading case on the construction of these two branches is *James v. Salter* (1). In that case a testator died in 1804, having by his will charged an annuity on certain lands with a power of distress after default in payment for twenty days. The annuitant never received any part of the annuity, and on the 17th of March, 1835, distrained for arrears, and, so far as is material, the question was whether the annuity was or was not extinguished. The case came twice before the Court of Common Pleas, first on the argument of a rule for a new trial and again upon a special verdict found at the second trial. On both occasions it was held that the case did not fall within any of the branches of the 3rd section; but on the second occasion it was held, contrary to an opinion expressed when the rule for a new trial was made absolute (2), that the object and intent of the 3rd section is to explain and give a construction to the enactment contained in the 2nd (now the 1st section of 37 & 38 Vict. c. 57), as to the time at which the right to make a distress or entry or to bring an action for any rent shall be deemed to have first accrued, in those cases only in which doubt and difficulty might occur, and that every case which plainly falls within the clear and unambiguous terms of the 2nd section (now the 1st section of 37 & 38 Vict. c. 37) is governed by its provisions (3). Consequently it was held that the annuity was extinguished twenty years after the first right to distrain accrued after the testator's death (4). And it must be observed that the time in such a case runs not from the day when the first payment of the annuity becomes due, but from the time when the right to distrain for such payment accrues. And this

(1) 3 Bingh. N. C. 544.

(2) 2 Bingh. N. C. 505.

(3) See *Pugh v. Heath*, 7 App. Cas. at p. 238. *Irish Land Commission v. Junkin*, 24 L. R. Ir. 40.

(4) And see *Langton v. Langton*, 18 Jur. 928.

may be of importance in cases where, as in *James v. Salter*, the right to distrain is given after default in payment for a specified time.

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In *James v. Salter* it seems to have been taken for granted on both arguments, that a devisee could not be within the second branch and was expressly excluded from the third, and on the second occasion it was laid down that, if a particular estate were created by devise, the second branch could not in any event apply, because the deviser who carved the particular estate out of the estate of which he was seised could not be said to be possessed of the same estate as that claimed by the devisee. Why the second branch could not apply in such a case it is not easy to see, and Lord St. Leonards considers (1), and it is submitted correctly, that the second branch includes those cases where the claimant derives title under a deceased person who was in possession till his death, when the possession was interrupted, and would include cases both of heirs and of devisees when intruded upon. It is not clear whether Lord St. Leonards here contemplates questions between an heir and a devisee, but it is submitted that they are included. Lord St. Leonards observes that, "as the ancestor, deviser, or grantor in the instances put must have been in possession of the whole estate or interest out of which the particular estate or the new rent (which stands on the same footing) was created, the claimant might fairly be considered to claim in the words of the second instance 'the estate or interest of a deceased person who continued in possession in respect of the same estate or interest until his death,' for the estate or interest which he does claim is part of and derived out of that estate or interest; they are not distinct subjects, but the same subject differently modified and clearly fall within the intention of the Act. The expressions in the third instance are not distinguishable from those in the second; and where the receipt of the

Is a devise
within
the second
branch?

(1) Property Statutes, 2nd ed. p. 22.

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Rent created by
will.

rent is spoken of, that seems to mean an existing rent prior to the grant, and does not affect the question as to a rent created by the instrument itself, which may be deemed an interest in the land." Except so far as the creation of a new rent is concerned, it is difficult to see how Lord St. Leonards' opinion can be controverted; but as regards a newly-created rent, it is submitted that his opinion cannot be supported, for in the first place the rent being claimed against the inheritance in the land, and, as lapse of time which extinguishes the rent extinguishes it solely in favour of that inheritance, it is hard to say that a former possessor of the unincumbered inheritance was entitled in respect of the same estate or interest as the person claiming the rent out of the land. In the second place, if these two branches be read *reddendo singula singulis*, with respect to land and rent according to the rule laid down in *Owen v. De Beauvoir* (1) they will, with respect to rent, stand thus:—"When the person claiming such rent claims the estate or interest of some deceased person who shall have continued in receipt of such rent in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such receipt of rent, then such right shall be deemed to have first accrued at the time of such death; and when the person claiming such rent shall claim in respect of an estate or interest in possession granted, appointed or otherwise assured by any instrument other than a will to him or some person through whom he claims by a person being in respect of the same estate or interest in receipt of the rent, and no person entitled under such instrument shall have been in such receipt of the rent, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid or the person through whom he claims became

(1) 16 M. & W. 564. See *ante*, Part V. Chap. III. p. 288.

entitled to the receipt of such rent by virtue of such instrument." The branches, if read in this way, cannot, it is clear, have reference to the case of rent newly created by deed or will, because they only apply where the grantor or deceased person had the same estate or interest as that claimed, which must be an estate or interest in rent, and, moreover, they cannot apply unless the grantor or deviser has been in receipt of the rent, and therefore the rent must have been an existing rent at the time of the death or grant, as the case may be.

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Where the owner in fee of an existing rent-charge grants or devises it, creating particular estates by such grant or devise, Lord St. Leonards' reasoning would be as clearly applicable as to a particular estate created in land; but in every case of a grant or devise of an existing rent-charge, the second or third branches, as the case may be, of the 3rd section appear to have no practical operation, for, if the grantee or devisee has never received any rent, the last receipt was by the grantor or deviser through whom the grantee or devisee claims, and such grantor or deviser, according to *Owen v. De Beauvoir* (1), discontinued the receipt within the meaning of the first branch of the 3rd section at the time of such last receipt, and at the end of twenty years from that period the rent would be extinguished. The result would seem to be as follows:—

Existing
rent de-
vised by
will.

(a) Any case not provided for by the 3rd section is within the general provision of the 2nd section (now the 1st section of 37 & 38 Vict. c. 57);

(b) The second branch of the 3rd section applies to persons deriving title under a deceased person, whether by devise or otherwise;

(c) Cases where particular estates in land are created by will or deed are equally within the second and third branches respectively as if the testator or grantor had

(1) 16 M. & W. 547.

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—

devised or granted to the claimant all the estate or interest he had ;

(d) Where a rent-charge is created by deed or will, the case is not within these branches of the 3rd section, but is left to the operation of the 2nd section only (now the 1st section of 37 & 38 Vict. c. 57), in consequence of which time begins to run from the date when the right to distrain accrues ;

(e) Where a rent-charge is not created but descends or is dealt with by will or deed, and the ancestor, deviser, or grantor has received all payments due up to his death or grant, it falls within the first branch, and the right of all persons claiming under the descent, devise, or grant is barred now in twelve years from the last receipt of rent by the ancestor, deviser, or grantor.

Mere absence of possession by claimant.

The third branch speaks of the case where “an estate in possession is granted by an instrument other than a will to the claimant by a person being in respect of the same estate in the possession of the land, and no person entitled under such instrument shall have been in such possession ;” the provision does not in terms require that any one else shall have been or remained in possession. However, it is not inconsistent with the words of this branch to apply to it the principle laid down in *Smith v. Lloyd* (1), *McDonnell v. McKinty* (2), and *Agency Co. v. Short* (3), a principle too which, as laid down, seems to have been intended to apply generally to the statute, namely, that there must be both absence of possession by the person who has the right and actual possession by another to be protected to bring the case within the statute (4) ; and so applying it, the result would be that mere absence of possession by the claimant under the instrument would not operate to bar his right, unless

(1) 9 Exch. 562 ; 23 L. J. Exch. 194.

(2) 10 Ir. L. R. 514.

(3) 13 App. Cas. 793.

(4) See *ante*, Part V. Chap. III. p. 289.

there had been actual wrongful possession for the statutory period.

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Mines.

This point may have considerable importance with regard to mines, for, if an owner in possession grants the minerals to another, retaining possession of the surface, and neither the grantee nor any one else works them, the question arises whose would the mines be at the end of twelve years. Mere non-user of mines, we have seen (1), is no evidence of abandonment of possession, but in those cases the persons of whose abandonment of possession there was held to be no evidence had been originally in actual possession of the mines by having been in possession of the surface before the mines were severed, and such possession was held to have continued notwithstanding non-user. But the cases do not go so far as to say that any one can be considered in possession of mines as a distinct inheritance from the surface, unless the possession was either actual or had been commenced by possession of the surface before the severance. However, it would seem that the grantor could not be held to be in possession of the minerals by virtue of his possession of the surface after he had by his own act severed the minerals from the surface and so made each a distinct hereditament. The case may be compared to that of a man who, being owner of a whole close of land, aliens a part of it. So long as he is owner of the whole, the actual occupation of a part may be considered an act of ownership over the entirety, but, when he has by his conveyance bounded himself off from a certain portion, he cannot surely be said to be in possession of that portion by remaining in occupation of the rest, if after the time of conveyance he never sets foot on the portion granted away. It would follow, therefore, on the principle laid down above that, as there was no possession to be protected, time would not run against the grantee who has the right to the possession.

(1) Part V. Chap. III. p. 296.

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In the case of *Keyse v. Powell* (1) it seems to have been considered that, if a lessee of mines did not enter and work them for the statutory period of limitation, his right would be barred at the end of the period, even though the lessor had not worked the mines in the meantime, the reason being that in such a case the lessee would only have an *interesse termini*, and that no estate would be transferred to him, the whole estate in the mines remaining vested in the grantor. It is submitted, however, that even in such a case the statute would not be a bar to the right of the lessee, as the lessor, though having in law the estate vested in him, would not have actual possession of the mines such as the statute is intended to protect.

Receipt of
rents by
agent.

Where a person commences to receive the rent of property as agent for the owner, his subsequent receipt of the rent is in law receipt by the owner until it is proved that the character in which he has received the rent is changed (2).

In the case of *Lyell v. Kennedy* (3), B., the owner in fee of certain property, died intestate in 1867. A., who had during the life of B. received the rents as her agent and paid them into a separate account at his own bank, continued to receive the rents as before, and stated that he received them as the agent and receiver for the true heir, whoever he might be; in 1880, A., having continued all along to receive the rents, claimed to be in receipt of the rents for himself. It was held by the House of Lords, in an action of ejectment which was brought in 1881 against A. by C. who claimed through the heir of B. that the acts of A. in receiving the rents after the death of B. could not dispossess the heir of B. either under the 2nd or 3rd or 8th section of 3 & 4 Wm. IV. c. 27, that A. was

(1) 2 E. & B. 132; 22 L. J. Q. B. 305.

(2) *Smith v. Bennett*, 30 L. T. N. S. 100. *Lyell v. Kennedy*, 14 App. Cas. 437.

(3) 14 App. Cas. 437.

never in actual possession for himself till 1880, that no action could have been brought against him till 1880, when he claimed the property for himself, that the heir of A. had been in possession from 1867 to 1880, and that the right of C. was not barred.

The principle governing the decision in *Lyell v. Kennedy* was applied in Ireland in the case of *McAuliffe v. Fitzsimons* (1). In that case lands held by the defendant on a yearly tenancy were devised by the lessor to A. for life with remainder to the issue of A. as A. should appoint. A. died in 1872, having appointed the lands in question to B., and having devised other lands to C. on trust. After A.'s death the defendant paid rent to C. for the lands which were the subject of the action, and C.'s agents gave receipts for the rent as due to the "representatives" of A.; B. died in 1879, having devised the lands to D.; after 1879 the defendant paid no more rent to any one. In an action for arrears of rent brought in 1888 by C. and D., the defendant did not require any question to be left to the jury, and a verdict was directed for both plaintiffs for six years' rent; on motion to enter the verdict for the defendant, the Court entered judgment for D. alone, and held that there was evidence from which the jury might find that the defendant, to the knowledge of C.'s agents, paid rent to them in the belief that they were acting for the true owner, and that D. within a reasonable time adopted and ratified their acts and that there had been no dispossession of B. or D.

(1) 26 L. R. Ir. 29.

CHAPTER V.

FUTURE ESTATES.

(Fourth Branch of 3 & 4 Wm. IV. c. 27, s. 3; 5th section of 3 & 4 Wm. IV. c. 27; 2nd section of 37 & 38 Vict. c. 57; 20th section of 3 & 4 Wm. IV. c. 27.)

PART V. THE fourth branch of the 3rd section of 3 & 4 Wm. IV.
CH. V. c. 27 deals with future estates, whether created by deed or will. The 2nd section of 37 & 38 Vict. c. 57 (which is substituted for and is an enlargement of the 5th section of 3 & 4 Wm. IV. c. 27), and the 20th section of 3 & 4 Wm. IV. c. 27, bear so much on the construction of this branch that it will be well to consider them together.

4th branch of 3rd section of 3 & 4 Wm. IV. c. 27. The fourth branch of the 3rd section of 3 & 4 Wm. IV. c. 27 is as follows:—

“When the estate or interest claimed shall have been an estate or interest in reversion or remainder or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession.”

2nd section of 37 & 38 Vict. c. 57. The 2nd section of 37 & 38 Vict. c. 57, which has taken the place of 3 & 4 Wm. IV. c. 27, s. 5, is as follows:—

“A right to make an entry or distress or to bring an action or suit to recover any land or rent shall be deemed to have first accrued, in respect of an estate or interest in reversion or remainder or other future estate or

interest, at the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land or rent, or some person through whom he claims, shall, at any time previously to the creation of the estate or estates which shall have determined, have been in the possession or receipt of the profits of such land or in receipt of such rent ;

“ But if the person last entitled to any particular estate on which any future estate or interest was expectant shall not have been in the possession or receipt of the profits of such land, or in receipt of such rent, at the time when his interest determined, no such entry or distress shall be made, and no such action or suit shall be brought, by any person becoming entitled in possession to a future estate or interest, but within twelve years next after the time when the right to make an entry or distress or to bring an action or suit for the recovery of such land or rent shall have first accrued to the person whose interest shall have so determined, or within six years next after the time when the estate of the person becoming entitled in possession shall have become vested in possession, whichever of those two periods shall be the longer ; and if the right of any such person to make such entry or distress, or to bring any such action or suit, shall have been barred under this Act, no person afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will or settlement, executed or taking effect after the time when a right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent shall have first accrued to the owner of the particular estate whose interest shall have so determined as aforesaid, shall make any such entry or distress or bring any such action or suit to recover such land or rent.”

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The 20th section of 3 & 4 Wm. IV. c. 27 is as follows:—

3 & 4 Wm.
IV. c. 27,
s. 20.

“When the right of any person to make an entry or distress or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall at any time during the said period have been entitled to any other estate, interest, right or possibility in reversion, remainder or otherwise, in or to the same land or rent, no entry, distress or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right or possibility, unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession.”

The fourth branch of the 3rd section of 3 & 4 Wm. IV. c. 27 includes future estates or interests of all kinds, including executory limitations (1). The fifth branch of the 3rd section and the whole of the 4th section relate to rights accruing by forfeiture and breaches of condition and are dealt with in a subsequent chapter (2).

The fourth branch of the 3rd section of 3 & 4 Wm. IV. c. 27 specifies the time when the right in respect of a future estate of any kind accrues, and the time specified is that at which the estate becomes an estate in possession, but that branch is only to apply where “*no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest.*”

Effect of
the 2nd
section of
37 & 38
Vict. c. 57.

The 2nd section of 37 & 38 Vict. c. 57, which is substituted for the 5th section of 3 & 4 Wm. IV. c. 27, points

- (1) *James v. Salter*, 3 Bingham N. C. 554.
- (2) Part V. Ch. VI.

out as the time when the right accrues in respect of a future estate the time when such an estate becomes an estate in possession by the determination of a preceding particular estate; this section is to apply “notwithstanding the person claiming such land or rent or some person through whom he claims shall at any time previously to the creation of the estate or estates which shall have determined have been in possession or receipt of the profits of such land or in receipt of such rent.” This last sentence apparently refers to the words in italics given above, which taken literally exclude every case where any person has obtained the enjoyment of the property in respect of the estate claimed, and the framers of the Acts seem to have apprehended that the words in question would even exclude the case where a grantor was in possession before the creation of such estate; whether such apprehension as to the effect of the words referred to was well founded or not, the above quoted sentence of the 2nd section of 37 & 38 Vict. c. 57 is a proviso over-riding them and includes the case where the person claiming, or some person through whom he claims, shall at any time previously to the creation of the particular estate or estates which shall have determined have been in possession of the land or in receipt of the rent.

The provisions of the 2nd section of 37 & 38 Vict. c. 57 just referred to, which are taken with some alterations from the 5th section of 3 & 4 Wm. IV. c. 27, must, it seems, include every case where a future estate in land or rent is claimed, as the claimant of such an estate must deduce his title proximately or remotely from some person who had possession of the property. Lord St. Leonards (1) and Mr. Hayes (2) both commented on the meaning of the 5th section of 3 & 4 Wm. IV. c. 27, which differs but little from the first part of the 2nd section of 37 & 38 Vict. c. 57, and, although they seem

(1) Property Statutes, 2nd ed. p. 43.

(2) Introduction to Conveyancing, 5th ed. vol. I. p. 255.

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to have found some difficulty in explaining the exact object of the 5th section of 3 & 4 Wm. IV. c. 27, their views seem in a great measure to coincide with what is laid down above. In Smith's Leading Cases (1) a somewhat different explanation is given, but one which has not been generally adopted.

The first part of the 2nd section of 37 & 38 Vict. c. 57 re-enacts the 5th section of 3 & 4 Wm. IV. c. 27, with the following alterations:—

Firstly, the words "or suit" are inserted after the word action; secondly, by the insertion of the words "or remainder or other future estate or interest," the 2nd section of 37 & 38 Vict. c. 57 is extended to all future estates, while the 5th section of 3 & 4 Wm. IV. c. 27 was limited to reversions; thirdly, the words "or rent" are added after the words "notwithstanding the person claiming such land." The omission of the word rent in this part of the 5th section of 3 & 4 Wm. IV. c. 27 was probably an accidental error, as rent was dealt with in the rest of the section. This clause of the 2nd section of 37 & 38 Vict. c. 57, like the section for which it is substituted, seems to define when the estate or interest is to be deemed to have become an estate or interest in possession within the meaning of the fourth branch of the 3rd section of 3 & 4 Wm. IV. c. 27 (2). The effect of this definition was considered in the case of *Hugill v. Wilkinson* (3), where it was held that, by virtue of the definition, a mortgagee of a reversionary interest in land could bring an action of foreclosure within twelve years after the reversionary interest became an interest in possession. This clause prevents some questions arising with reference to reversions expectant on leases with rent reserved, which might have been raised on the words of the fourth branch of the 3rd section of

(1) 2 Sm. L. C. 9th ed. p. 748.

(2) *Doe d. Hall v. Mouldsdales*, 16 M. & W. 695.

(3) 38 Ch. D. 480. See *In re Conlan's Estate*, 29 L. R. Ir. 199.

3 & 4 Wm. IV. c. 27. If a reversioner in such case had entered and distrained, it might have been argued that he then "obtained the receipt of the profits of the land" in respect of the reversion; or even the mere receipt of rent reserved might, by the 35th section of 3 & 4 Wm. IV. c. 27, have been thought to be "the receipt of the profits of the land" within the meaning of the fourth branch of the 3rd section. According to such an interpretation, a new right could not have accrued to the reversioners on the determination of the particular estate but for the explanatory section (formerly sect. 5 of 3 & 4 Wm. IV. c. 27, now the first clause of sect. 2 of 37 & 38 Vict. c. 57). The effect of the fourth branch of the 3rd section of 3 & 4 Wm. IV. c. 27, and the 2nd section of 37 & 38 Vict. c. 57, is in general to give the person entitled to a future estate a new right at the time when the preceding estate determines, so that, if the owner of an estate grant out of it a particular estate with a reversion or remainder following, and the owner of the particular estate takes possession, the right of the persons entitled in reversion or remainder will accrue at the determination of the particular estate, and this even if the grantor had discontinued possession before the time of his grant. Though the statute may be running against a settlor at the time the settlement is made, yet the fact of the grantee of a particular estate taking possession under the settlement will revest the title of all persons entitled to remainders under the settlement, as well as that of the settlor and his heirs in reversion. If, however, twelve years elapse after the dispossession of the grantor without the grantee of the particular estate entering into possession, the provisions of the 2nd section of 37 & 38 Vict. c. 57 would not save the persons entitled in remainder or reversion from being barred, as the title of the grantor and of those claiming through him is then extinguished as from the time when the statute began to run, and therefore the

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Settlement
after time
has begun
to run.

particular estate is treated as if it never came into existence.

The principle laid down in this last proposition is one which must be carefully borne in mind. The principle is expressed in a judgment by Lord St. Leonards, when Lord Chancellor of Ireland, in these words: "It is admitted that, after the statute has once begun to run, a party cannot, by putting his estate into settlement, raise up new rights and give new claims to persons deriving under the settlement" (1); and Mr. Hayes lays down, that "the effect of the statute must always be determined with reference to the actual state of the title where time begins to run," and that, "when the time has once commenced running, no subsequent alteration in the title will postpone the bar" (2). There may be some difficulty in carrying out this principle consistently with the wording of some of the other branches of the 3rd section of 3 & 4 Wm. IV. c. 27, although this does not appear to have been noticed by Mr. Hayes, or by Lord St. Leonards, either in the case referred to (1), or in his essay on the Property Statutes (3). For instance, supposing an owner in fee is dispossessed so that time begins to run against him under the first branch of the 3rd section and subsequently, before the twelve years have elapsed, he settles the estates in strict settlement, and a person entitled in possession to an estate in remainder created by the settlement brings his action to recover possession, it might at first sight seem that such a case would not come within the first branch of the 3rd section, because, as the estate claimed is the estate in remainder, the settlor was not in possession in respect of the estate claimed; but, on the other hand, it appears that, as the person through whom the remainderman claims is the settlor, the remainderman claims the estate of the settlor,

(1) *Stackpoole v. Stackpoole*, 4 D. & War. 320, at p. 347.

(2) Introduction to Conveyancing, 5th ed. vol. I. p. 257.

(3) See Property Statutes, p. 38.

and, therefore, the settlor may equally well be said to have been in possession in respect of the estate or interest claimed. It will be found on examination that any similar difficulties that may arise on the wording of the second or third branches of the 3rd section of 3 & 4 Wm. IV. c. 27 can be explained by reasoning analogous to this.

It is of importance not to lose sight of this principle, for if the contrary were held, the statute would be of little avail in quieting titles, and a principle would be upset which is habitually acted on, namely, that if the rightful owner when dispossessed was seised in fee, the person in actual possession for the statutory period must, at the end of such period, be absolutely safe from the claims of the rightful owner and all persons claiming under him; indeed, if a different view were adopted, it would be impossible that a title depending on the statute should in any case be forced upon a purchaser, as may now be done (1). If a testator, who is owner in fee, and has been dispossessed before his death, devises his property in settlement, the case comes within the first branch of the 3rd section, and all persons claiming under the will are, upon the principle laid down above, barred at the end of twelve years from the testator's dispossession. But if a testator devises his property in settlement and remains in possession until his death, and the persons entitled under the will to an immediate estate on his death do not acquire possession, the statute begins to run against them at the death, and, therefore, the time of the death is the time to look at the state of the title. In such a case, as the limitations of the will take effect at the death, the statute begins to run against the first tenant for life at the time of such death under the second branch of the 3rd section, while the rights of the

(1) See *Scott v. Nixon*, 3 D. & War. 388; *Games v. Bonnor*, 54 L. J. Ch. 517, 33 W. R. 64; *Dart's Vendors and Purchasers*, 6th ed. vol. I. p. 462.

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remaindermen are governed by the fourth branch, and the right of each will accrue successively as each estate becomes an estate in possession. But where, on the death of a mortgagor, the mortgagee had gone into possession, and the devisees in remainder of the mortgagor filed a bill for redemption against the mortgagee more than twenty years after the mortgagee had gone into possession, but less than twenty years after the estate of the plaintiffs had fallen into possession, it was held by Lord Plunkett that they were barred (1). This would equally apply if the equity of redemption were settled by deed subsequently to the date of the mortgage. This decision would seem to be somewhat at variance with the principle just laid down, but it was founded on the wording of the 28th section of 3 & 4 Wm. IV. c. 27, relating to the rights of mortgagors as against mortgagees in possession (2).

Successive
remain-
ders.

Under the provisions of 3 & 4 Wm. IV. c. 27, with regard to future estates, if a person in possession of land made a settlement creating a series of particular estates and remainders, and a wrongdoer subsequently during the existence of the first particular estate obtained possession, each remainderman on his estate becoming an estate in possession was entitled to a fresh period of twenty years within which to bring an action for the recovery of the land. And it would seem that where a person entitled to an estate in remainder settled it before it became an estate in possession, but after the wrongful possession had commenced, a fresh right accrued in succession to each remainderman claiming under the settlor, because, although the wrongful possession commenced before the date of the settlement, yet time, so far as the settlor and all claiming under him were concerned, would only begin to run upon the estate in remainder of the settlor becoming an estate in possession :

(1) *Browne v. Bishop of Cork*, 1 D. & Walsh, 700.

(2) See *post*, Part V. Ch. XXI.

that is the time, therefore, at which, according to the rule laid down above, the state of the title was to be looked at for the purpose of determining the effect of the statute.

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The law on this subject is now altered by an entirely new provision which forms the latter part of the 2nd section of 37 & 38 Vict. c. 57. This clause is as follows :

“ But if the person last entitled to any particular estate on which any future estate or interest was expectant shall not have been in the possession or receipt of the profits of such land or in receipt of such rent at the time when his interest determined, no such entry or distress shall be made, and no such action or suit shall be brought by any person becoming entitled in possession to a future estate or interest, but within twelve years next after the time when the right to make an entry or distress, or to bring an action or suit for the recovery of such land or rent shall have first accrued to the person whose interest shall have so determined, or within six years next after the time when the estate of the person becoming entitled in possession shall have become vested in possession, whichever of those two periods shall be the longer ; and if the right of any such person to make such entry or distress or to bring any such action or suit shall have been barred under this Act, no person afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will or settlement executed or taking effect after the time when a right to make an entry or distress or to bring an action or suit for the recovery of such land or rent shall have first accrued to the owner of the particular estate whose interest shall have so determined as aforesaid shall make any such entry or distress or bring any such action or suit to recover such land or rent.” This proviso consists of two separate clauses. The general effect of the first clause is this : Where a particular estate has been created with

37 & 38
Vict. c. 57,
s. 2.

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a reversion or remainder expectant on its determination, if a person without title (1) obtain possession during the existence of this particular estate and remain in possession for twelve years, not only is the owner of the particular estate barred at the end of that time, but the reversioner or remainderman is also barred, unless he brings his action within six years of the time when his reversion or remainder becomes an estate in possession. For instance, if an owner in possession creates an estate for life with remainder over, and the tenant for life is dispossessed and dies after being four years out of possession, the remainderman has eight years to bring his action. If the tenant for life has been out of possession more than six years at the time of his death, the remainderman has six years from the death before he is barred. This is the simple case where a settlor in possession creates a single estate for life with a remainder in fee. The case is more complicated where a series of remainders are limited to take effect in succession. In this case it is clear that by the words of the section each remainderman has six years to bring his action after his own estate became an estate in possession. This clause only applies where the person entitled is out of possession and has a right to bring an action to recover possession; it does not apply where the actual possession and the right to possession are not severed; for instance, where a tenant for life conveys property, and the grantee is in possession under the conveyance, the tenant for life is not "the person last entitled" within the meaning of this clause, and the remainderman has twelve years to bring his action after the death of the tenant for life, and is not limited to twelve years from the grantee's taking possession, or six years from the death of the tenant for life (1).

There are cases in which upon the words of the section it may be argued that a remainderman has more than

(1) *Pedder v. Hunt*, 18 Q. B. D. 565.

six years to bring his action even against a person who has been in possession without title for six years or more. Take the following case: An estate in possession is settled in 1870 as follows—to A. for life, remainder to B. for life, remainder to C. in fee. In 1871 D., a wrongdoer, takes possession, and having held possession till A.'s death in 1884, continues in possession during B.'s life. B. dies in 1886, four years before his title would be barred. By the provisions of the first clause of this proviso, his right accrues on B.'s death in 1886. The "person last entitled" to the particular estate on which C.'s estate or interest was expectant was B., whose right of entry or action first accrued on the death of A. in 1884. Thereupon, according to the strict words of the enactment, it would seem that C. might bring his action at any time within twelve years of A.'s death in 1884, which would give C. till 1896, instead of his being limited to six years from B.'s death, which would only give him till 1892. This effect was probably not in the minds of the framers of the Act.

The second clause of the proviso is as follows: "And if the right of any such person to make such entry or distress, or to bring any such action or suit shall have been barred under this Act, no person afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will, or settlement executed or taking effect after the time when a right to make an entry or distress, or to bring an action or suit for the recovery of such land or rent shall have first accrued to the owner of the particular estate whose interest shall have so determined as aforesaid shall make any such entry or distress, or bring any such action or suit to recover such land or rent."

"Any such person" clearly means "any person becoming entitled in possession to a future estate or interest." The effect of the clause then is to provide that

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if a reversioner or remainderman settles his estate after the statute has begun to run against the person entitled to the particular estate in possession, the title of all persons claiming under such settlement will be barred if and when the settlor is barred. Thus, suppose A. be tenant for life with remainder in fee to B., and A. is dispossessed by a stranger, and B. afterwards during A.'s life settles his estate in remainder on himself for life, with remainder to C. for life, remainder to D. in fee. If on A.'s death B. takes no steps to recover the land till the statute has run out against him and his own title is barred, in that case C. and D. and all persons claiming through them are barred also. It must be observed that the clause only applies "where the right of any such person . . . shall have been barred." If, therefore, B., the settlor, in the case supposed die before his remainder fall into possession, or if he becomes entitled in possession and dies while the statute is running against him, and before his right is barred, this clause has no operation, and the rights of persons claiming under the settlement must be determined by the other provisions of the statute.

Settle
ments by
parties
having
particular
estates and
reversions.

Having considered the effect of the dealing by an owner of an estate in possession with such estate after time has begun to run, and by an owner of an estate in remainder with his estate after time has begun to run against the owners of the prior estate in possession, let us consider what is the effect of the dealings by a tenant for life and remainderman, when time is running against the tenant for life, with their estates *inter se*, and their joint dealings with such estates in favour of third parties.

Where A. is tenant for life, with remainder to B., and, while time is running against A., A. surrenders his estate to B., it would seem clear that, as B.'s remainder is accelerated by the merger of the two estates and so falls into possession, time will begin to run against B. under the fourth

branch of the 3rd section of 3 & 4 Wm. IV. c. 27 from the date of the surrender and not from the death of A.; so, if in similar circumstances B. conveys his remainder to A., it would seem that A. by acquiring B.'s estate acquires a new right in respect of such estate, and that A. would be barred not in twelve years from the moment when the statute began to run against his life estate, but, as in the former case, in twelve years from the date of the conveyance, by which A. acquires in possession B.'s estate in remainder; and it would follow that, if in similar circumstances A. and B. together conveyed their estates to a third person, time would run against such third person from the date of such conveyance. Let us now consider the case where, while time is running against A., A. and B. together concur, not in conveying the property to one absolutely, but by way of settlement creating particular estates and remainders. If some of these estates are of such a nature that they are commensurate with and must take effect out of A.'s estate only, and all the rest are such that they must take effect out of B.'s estate, it would seem that the owner of the former class of estates may be considered as claiming through A. only, and the owners of the latter class as claiming through B. only, and that time would run against their respective interests accordingly. If, however, the resettlement creates an estate in remainder which takes effect out of the estates of A. and B. jointly, a difficult question arises, whether time begins to run from the date of the resettlement, or from the time of such new estate in remainder taking effect in possession; the latter view is probably correct, because until the new estate takes effect in possession, the merger of the two estates through which the new estate takes effect can hardly be said to take place. In *Doe v. Edmonds* (1) an estate stood limited to a mother for life, with remainder to her son in tail, and while time was running against the mother, the father, mother and son suffered a recovery and

Doe v.
Edmonds.

(1) 6 M. & W. 295.

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—

resettled the estate on the father for life, remainder to the mother for life, remainder to the son for life, remainder to his issue in tail, remainder to a daughter. The new estate of the father in possession took effect out of the old estates of the mother and son jointly, so that there must have been a merger of the two old estates to create such new estate; yet it was held after the death of the father and mother, and of the son without issue, that for the purpose of ascertaining when time began to run against the daughter, the new estate tail of the son and the estate of the daughter ought to be considered as having been carved out of the old estate tail of the son enlarged into a fee. In this case it was said that time ran against the daughter from the death of the mother in 1822. But, as the action was brought within twenty years of that date, it was unnecessary to consider whether time began to run then or on the death of the son in 1828. If A., the owner of a particular estate, and B., the person entitled in remainder, join in a conveyance or resettlement when A. has been so long out of possession that the statutory period has run out against him, then, A.'s estate being extinguished, no conveyance by him has any effect, and the conveyance and resettlement, so far as they take effect, take effect out of B.'s estate only, and time runs as if B. had aliened an estate in remainder expectant on the determination of an estate held for the life of A.

Renewal of
lease
during
encroach-
ment.

Where a lease is surrendered and a new lease contemporaneously granted to the lessee, the reversion must be considered as falling into possession at the time of the renewal of the lease. If a person without title has during the currency of the old lease obtained possession of the demised premises or any part thereof, a right of action within the meaning of the Act accrues to the reversioner at the time of the renewal, and the statute runs against him from that time (1). If a trespasser is in possession of demised pre-

(1) *Ecclesiastical Commissioners v. Rowe*, 5 App. Cas. 736, overruling on this point *Corpus Christi College v. Rogers*, 49 L. J. C. L. 4. See *Ecclesiastical Commissioners for England v. Tremer* (1893), 1 Ch. 166.

mises and continues so in possession at the expiration of the lease, time begins to run against the reversioner from the expiration of the lease, and the granting of a fresh lease by the reversioner cannot avail him as against the trespasser, if there is no possession under the fresh lease. At the end of twelve years from the expiration of the first lease the right both of the reversioner and of the person claiming under the fresh lease will be barred (1). A conveyance by the Irish Landed Estates Court of a leasehold interest which has become barred, does not defeat the right which has been acquired by possession. Such a conveyance does not affect the rights of third parties, but only transfers the lessee's estate, whatever it is, with all its incidents, conditions, and liabilities (2).

Although a lessee has paid no rent to the lessor for more than twelve years, it is clearly settled that the right of the lessor to recover in ejectment accrues under the fourth branch of the 3rd section of 3 & 4 Wm. IV. c. 27, at the determination of the lease, and that he may bring his action at any time within twelve years of that event (3). The case in which this was laid down seems to have been decided without reference to the effect of a proviso for forfeiture for the non-payment of rent which will be discussed below (4).

Right of
lessor
where
no rent has
been paid
for twelve
years.

If a tenant in tail convey to a stranger by an assurance which is ineffectual to bar the issue, and possession is taken under such assurance, the right of the issue or remainderman, as the case may be, to enter on the death of the tenant in tail is a future estate within the fourth branch of the 3rd section of 3 & 4 Wm. IV. c. 27 (5). If land be limited to a husband and wife for their lives, remainder to the husband in fee, the right of the husband

Instances
of future
estates.

(1) *Kennedy v. Woods*, 1 Ir. R. C. L. 76; 2 Ir. R. C. L. 436.

(2) *Kennedy v. Woods*, *ubi supra*; *Nixon v. Darley*, 2 Ir. R. C. L. 467.

(3) *Doe d. Davy v. Oxenham*, 7 M. & W. 131.

(4) Part V. Ch. VI. p. 336.

(5) *Cannon v. Rimington*, 12 C. B. 1.

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and his heirs on the death of the wife is also a future estate within that branch (1). And so, in cases not governed by the Married Women's Property Act, 1882, is the right of a wife, or her heirs, to enter on her property on the death of her husband when he has conveyed it to another by an assurance not binding on the wife (2); but if a husband and wife simply discontinue the possession of the wife's property, then, subject to the question of disabilities, time runs against the wife and her heirs from the time when the possession is discontinued, and no fresh right accrues under the fourth branch of the 3rd section of 3 & 4 Wm. IV. c. 27, on the death of the husband (3); and in such a case no fresh right accrues to the husband on the death of the wife in respect of the curtesy, as, by the interpretation clause of 3 & 4 Wm. IV. c. 27 (4), a tenant by the curtesy is considered as claiming through the wife.

Several
independ-
ent rights
to same
property.

If a person has two independent rights to the same property, there would seem to be nothing in the 1st section of 37 & 38 Vict. c. 57, which would of necessity bar at the same time all his remedies in respect of both rights. The remedy for each right would stand on its own footing, and, as the effect of the 34th section of 3 & 4 Wm. IV. c. 27 is only to extinguish the right as to which the remedy is taken away, it seems clear that, if it had not been for the 20th section of 3 & 4 Wm. IV. c. 27, each right would exist and be barred independently and irrespective of the others. But the effect of the 20th section of 3 & 4 Wm. IV. c. 27 is that, if the right to a particular estate in possession has been barred, the right of the owner of such estate or of any one claiming through him to any future estate or interest, to which such owner was or became entitled at any time while the statute was running against

(1) *Doe d. Johnson v. Liversedge*, 11 M. & W. 517. See *post*, p. 331.

(2) *Jumpsen v. Pitchers*, 13 Sim. 327.

(3) *Doe d. Corbyn v. Bramston*, 3 A. & E. 63.

(4) Sect. 1.

the particular estate, is barred at the same time ; and the statute does not begin to run in respect of such future estate, unless in the meantime some person entitled to a particular estate, subsequent to the one barred, shall have obtained possession. If this exception at the end of the 20th section had not been inserted, the effect would have been that if there were two successive tenants for life with remainder to the first in fee, and the estate for life of the first had been barred in favour of a trespasser against whom the second recovered possession, the property would, at the death of the second tenant for life, have belonged either to his representatives who clearly would have no title, or to the trespasser who had been already successfully ejected. It must be particularly observed that the right to the future estate is not affected, unless the person entitled to the estate in possession becomes entitled to the future estate before the estate in possession has been barred. If this were otherwise, the owner of a particular estate which was barred would, if he purchased an estate in remainder, acquire nothing, although the right of the remainderman from whom he purchased would have been unaffected. Nor is the right to the future estate affected, unless the particular estate in possession has been actually barred, and it is consequently unaffected if the particular estate determines before the prescribed period has run out. This is noticed by Lord St. Leonards (1) in commenting on the case of *Doe v. Liversedge* (2). In that case, copyhold property was limited to a husband and wife with remainder to the heirs of the husband. The husband went abroad in 1805, and was never heard of again. In 1807 he was made a bankrupt, and his property was vested in his assignees in bankruptcy. The wife remained in possession till her death in 1841, and within twenty years of that date the assignees brought ejectment against the devisee. The action was held to be in time, because,

Doe v.
Liversedge.

(1) Treatise on Property Statutes, p. 50.

(2) 11 M. & W. 517.

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although the assignees took all the husband's interest both for life and in remainder, yet the presumption was that the husband died before 1812; and the life interest of the wife which she acquired by survivorship was one which had been limited or had taken effect after or in defeasance of the husband's estate or interest in possession within the meaning of the exception at the end of the 20th section, and had been recovered by her within the meaning of that exception. This case, as Lord St. Leonards remarks, could not have come within the 20th section at all, because, as the husband's particular estate was presumed to have determined before 1812, the title of the assignees to such interest could not have been barred; however, as the decision was given on the assumption that the 20th section applied, this case may be taken as an authority that, if a person entitled to an estate to take effect in defeasance of the estate in possession is shown to be actually in possession, it is immaterial for the purposes of the exception, notwithstanding the use of the word "recover," how the possession was acquired. It also decides that, if a tenant for life is ousted, not by a stranger but by a succeeding tenant for life who retains possession more than twelve years during the lifetime of the first and then survives him and retains possession, the right of the persons claiming the estate in remainder to which the ousted tenant for life was entitled will, under the exception in the 20th section, be preserved by the possession of the second tenant for life after the death of the first, and that such persons will have twelve years from the death of the second tenant for life wherein to assert their right, just as if the first tenant for life had been ousted by a stranger and their right had been preserved by the entry of the second tenant for life.

Where
owner of
particular
estate is
the imme-
diate re-
versioner.

Where an estate *pur autre vie* and the remainder expectant on the determination of such estate became vested in the same person in circumstances which made it doubtful whether a merger had or had not taken

place, and the plaintiff claiming through this person brought her action less than twenty years after the life dropped, but more than twenty years after the estate *pur autre vie* accrued, and more than twenty years after the time when the merger (if any) would have taken place, it seems to have been admitted on all hands that, if a merger had taken place, the action would have been barred, and this must have been so on the principles laid down above (1). But it was considered unnecessary to decide that question, and, assuming that there was no merger, the claim to the reversion was held barred by the operation of the 20th section (2). In the circumstances of the case the action was clearly barred *quâcunque viâ*, but it is worth considering what would have been decided if it had been clear that there had been no merger, and if time had not run out against the estate *pur autre vie* before the last life dropped. The 20th section would then have had no operation. Now that section was not referred to in the argument for the defendant. The defendant's case was, assuming there was no merger, put upon this, that the 5th section of 3 & 4 Wm. IV. c. 27 (now the first part of the 2nd section of 37 & 38 Vict. c. 57) defined when the estate was to be deemed to have fallen into possession within the meaning of the 4th branch of the 3rd section, that the 5th section from its wording clearly applied only to cases where the particular estate was vested in some other person than the reversioner, and consequently it seems to have been contended that neither the 4th branch of the 3rd section nor the 5th section applied to the case, and therefore that time would run against the estate in remainder from the date when time began to run against the particular estate and would not begin to run afresh when that estate determined. This reasoning, although the 20th section was referred to in the judgment, was certainly acquiesced in to the extent that the 5th section did

(1) See *ante*, p. 326.

(2) *Doe d. Hull v. Mouldsdale*, 16 M. & W. 689.

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not apply where the owner of the particular estate was also the reversioner, and may perhaps be considered to have been acquiesced in altogether; the case may therefore be considered an authority that, if there can in any circumstances be a particular estate and reversion vested in the same person without merging, then, if the particular estate determines while time is running against it but before it is barred, the time continues to run, and does not begin to run afresh from the determination of the particular estate. It appears, however, somewhat difficult to see why the words of the 5th section of necessity lead to such a conclusion; and, in fact, in the case referred to, the 20th section seems rather to have been treated as giving an interpretation to the 5th section than merely as a proviso upon it. A somewhat similar point to that raised in *Doe v. Mouldsdale* was raised by Pigot, C.B., in the Irish case of *Poole v. Griffith* (1), but as it was not actually involved in the decision, the observation of the C.B. cannot be considered in any way authoritative on the subject.

The case of *Doe d. Hall v. Mouldsdale* was followed by the Court of Queen's Bench in Ireland in the case of *Clarke v. Clarke* (2). In that case a testator devised certain lands to A., and if A. either married or cohabited with a Roman Catholic or if he died without a lawful heir, then the testator devised the property to B. A. cohabited with a Roman Catholic and also died without a lawful heir. More than twenty years after the time when A. began to cohabit with the Roman Catholic, but a few months only after his death, B. brought ejectment against the devisee of A. It was held under the 20th section of 3 & 4 Wm. IV. c. 27 that the statute ran against B. from the happening of the first event, and that he could not recover.

(1) 15 Ir. C. L. R. 277, 292.

(2) 2 Ir. R. C. L. 395. But see *Astley v. Earl of Essex*, L. R. 18 Eq. 290, and *post*, Ch. VI. p. 338.

CHAPTER VI.

FORFEITURES AND BREACHES OF CONDITIONS.

(*Fifth Branch of 3rd section and 4th section of 3 & 4 Wm. IV. c. 27.*)

THE fifth branch of the 3rd section and the 4th section of 3 & 4 Wm. IV. c. 27 relate to rights acquired by forfeitures and breaches of conditions, and must be considered together. They are as follows :—

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“And when the person claiming such land or rent or the person through whom he claims shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken.”

Fifth
branch
of 3rd
section
of 3 & 4
Wm. IV.
c. 27

“Provided always, that when any right to make an entry or distress or to bring an action to recover any land or rent by reason of any forfeiture or breach of condition shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened.”

4th section
of 3 & 4
Wm. IV.
c. 27.

These provisions, as was remarked *arguendo* in *Doe d. Hall v. Mouldale* (1), clearly apply to every forfeiture or

(1) 16 M. & W. 696; and see *Whitton v. Peacock*, 3 M. & K. 325.

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breach of condition, and not merely to cases between landlord and tenant. Under the old law a remainderman or reversioner who had a right of entry on forfeiture of the particular estate was not bound to enforce the forfeiture, and his rights at the determination of such estate were in no way prejudiced by his not enforcing the forfeiture (1). The object of the 4th section of 3 & 4 Wm. IV. c. 27 is to preserve this rule.

Ejectment
for non-
payment
of rent.

We have seen that it is settled that, although no rent has been paid for upwards of twelve years before the expiration of a lease, the reversioner has, notwithstanding, twelve years from the determination of the lease in which to recover possession (2). But it may be observed here that in the case referred to (3) it does not appear whether there was or was not a proviso for re-entry on non-payment of rent, and the case seems to have been decided on the fourth branch of the 3rd section of 3 & 4 Wm. IV. c. 27 without reference to the fifth branch; but it is clear that, even if there had been such a proviso, the law as there laid down would have been equally correct, because the right of the reversioner would then have been saved by the 4th section. We have seen, too, that the right to distrain for rent reserved on a lease is unaffected by any lapse of time during which no rent has been paid, although only six years' arrears are recoverable (4). It was decided in Ireland in the case of *Doe v. Bingham* (5) that the right of a landlord to re-enter for non-payment of rent was barred by non-payment for twenty years (*i.e.* under 3 & 4 Wm. IV. c. 27). This case seems to have been decided on the ground that ejectment for non-payment of rent under the Irish Landlord and Tenant Acts was a proceeding for the

(1) *Doe d. Cook v. Danvers*, 7 East, 299; and see *Doe d. Allen v. Blakeway*, 5 C. & P. 563.

(2) Part V. Ch. V. p. 329.

(3) *Doe d. Davy v. Oxenham*, 7 M. & W. 131.

(4) See *ante*, Part V. Ch. II. p. 279.

(5) 3 Ir. L. R. 456.

recovery of rent, and that conventional rents were within the 2nd section of 3 & 4 Wm. IV. c. 27; but since the decision of *Grant v. Ellis* (1), which makes the last-mentioned ground untenable, *Doe v. Bingham* has been three times overruled (2).

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Where A. having a lessee for a term of years granted a lease at a certain rent for the whole remainder of the term so as to leave no reversion in himself, and for twenty-two years no rent was paid, it was held that the rent reserved was a conventional rent of the same character as that reserved to a landlord from his tenant, and that the right of A. and his representatives to the rent during the residue of term was not barred by 3 & 4 Wm. IV. c. 27, s. 2 (3).

Rent reserved when no reversion.

Lord St. Leonards (4) curiously quotes *Doe v. Bingham* without apparent disapproval and without noticing the grounds of the decision in the three subsequent cases to the contrary effect. In Ireland ejectment for non-payment of rent may be brought, even though no power of re-entry be reserved (5), and has become the usual mode of enforcing payment of rent in arrear, and is therefore looked upon rather as a proceeding for that purpose than as one to recover the land. Hence questions on this point naturally arise oftener in that country than in England. In the three cases referred to as overruling *Doe v. Bingham*, the principal ground of the judgments appears to have been that, treating ejectment for non-payment of rent as substantially a remedy for recovering rent, the point was settled by the principle affirmed in *Grant v. Ellis* (6). They are not, therefore, authorities directly applicable to leases with a power of re-entry in

(1) 9 M. & W. 113. See *supra*, Part V. Ch. II. p. 279.

(2) *Lessee of Crosbie v. Sugrue*, 9 Ir. L. R. 17; *Lessee of Parke v. McLoughlin*, 1 Ir. C. L. R. 186; *Spratt v. Sherlock*, 3 Ir. C. L. R. 69.

(3) *Re Turner's Estate*, 11 Ir. Ch. R. 304.

(4) Prop. Stat. 43.

(5) See 23 & 24 Vict. c. 154, s. 53.

(6) 9 M. & W. 113.

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England, where it is believed no case has been decided on that point. It is, however, submitted that, as it appears to be generally true that the omission to enforce one forfeiture does not prejudice the right to enforce a subsequent one, and as the lease clearly remains in existence until a forfeiture is actually enforced, a fresh right to re-enter accrues and therefore time begins to run afresh every time a fresh default in payment is made.

Condi-
tional
limitation.
Breach of
condition.

The 4th section of 3 & 4 Wm. IV. c. 27 operates to preserve the right of the remainderman not only where he has a right of entry on a forfeiture in the strict sense of the word but also where by the terms of a conditional limitation the previous estate is expressed to come to an end on the breach of a condition and the estate of the remainderman to fall into possession. Therefore, if an estate be limited in tail with remainder over, subject to a clause that if the tenant in tail do not take the name and arms of the donor or reside in the mansion house his estate shall cease and the property belong in possession to those in remainder, and the tenant in tail after breaking the condition holds the property for twelve years and then dies without issue, the original right of the remainderman accrues on his death as if the condition had not been broken (1).

(1) *Astley v. Earl of Essex*, L. R. 18 Eq. 290, 43 L. J. Ch. 817. But see *Clarke v. Clarke*, 2 Ir. R. C. L. 395, and *ante*, p. 334.

CHAPTER VII.

ADMINISTRATION (3 & 4 WM. IV. c. 27, s. 6).

BEFORE the passing of the Act 3 & 4 Wm. IV. c. 27, if any right accrued between the death of an intestate and the grant of letters of administration, time did not begin to run against such right under any Statute of Limitation, until the time when letters of administration were taken out. The consequence was that, if the right to a chattel interest in land fell in after the death of a person intestate, that right might be kept alive for an indefinite period by the fact that no one took out letters of administration, though the land was in the hands of an adverse possessor (1). The 6th section of the Act 3 & 4 Wm. IV. c. 27 prevents the occurrence of any such inconvenience for the future. It enacts as follows:—

“For the purposes of this Act an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration.”

Time, therefore, now runs against the right of an administrator to an estate or interest in land or rent from the time when the estate or interest became an estate or interest in possession, as it always did when the deceased left an executor.

It has been held by Stirling, J. (2), following a deci-

(1) *Stanford's case*, cited Cro. Jac. 61; *Fairclaim v. Little*, cited in *Murray v. East India Co.*, 5 B. & Ald. 214; and judgment in *Murray v. East India Co.*, *ib.* 212.

(2) *In re Williams. Davies v. Williams*, 34 Ch. D. 558.

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6th section
of 3 & 4
Wm. IV.
c. 27.

PART V. sion of Chitty, J., in chambers, that sect. 6 applies for all
CH. VII. the purposes of the Act, and is not merely a proviso to
— the sections preceding it.

In an earlier case before Knight Bruce, V.-C., the 42nd section of 3 & 4 Wm. IV. c. 27 was relied on as a bar to the recovery of more than six years' interest on a pecuniary legacy. The Vice-Chancellor expressed an opinion that the 6th section did not make an acknowledgment given after the death of the legatee intestate to a person who afterwards became administrator effectual to keep alive the right to recover more than six years' arrears, and that such an acknowledgment was not given to the person entitled to the money (1).

(1) *Holland v. Clark*, 1 Y. & C. C. C. 151, 170.

CHAPTER VIII.

TENANCIES AT WILL (3 & 4 WM. IV. C. 27, s. 7).

THE 7th section of 3 & 4 Wm. IV. c. 27, relating to tenancies at will, is as follows:—

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“When any person shall be in possession or in receipt of the profits of any land or in receipt of any rent as tenant at will, the right of the person entitled subject thereto or of the person through whom he claims to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued, either at the determination of such tenancy or at the expiration of one year next after the commencement of such tenancy at which time such tenancy shall be deemed to have determined; provided always that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee.”

7th section
of 3 & 4
Wm. IV.
c. 27.

Before the Act 3 & 4 Wm. IV. c. 27, as there could be no right of entry till the determination of a tenancy at will, it followed that time could not begin to run till such determination, however long the tenancy might continue; and as, if an occupation once commenced as a tenancy at will, it remained such till it was determined, the consequence was that a person might in fact be in possession for a very long period without paying any rent or making any acknowledgment of title and yet be liable to be ousted by the lessor; and an acknowledgment by pecuniary payment or otherwise, after an occupation of any length of time, was evidence that the

How
tenancy at
will is
determined
irrespec-
tive of Act.

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occupation was permissive from the beginning (1). The 2nd section of 3 & 4 Wm. IV. c. 27 (now the 1st section of 37 & 38 Vict. c. 57) would alone have made no difference in this, for the lessor at will, although he has a right to determine the tenancy at any moment, can have no right of entry within the meaning of the 2nd section of 3 & 4 Wm. IV. c. 27 (or the 1st section of 37 & 38 Vict. c. 57) until he is in a position to bring an action of ejectment (2), which will not be till lawful possession under the tenancy is determined by a demand of possession or otherwise (3). The lessor may determine a tenancy at will, not only by an actual demand of possession, but by words expressing an intention to determine it, even if spoken off the premises, provided the tenant has notice (4), or by any act on the premises which would otherwise be a trespass, and that whether any intention on the lessor's part to determine the tenancy is or is not shown (5), or by an entry for the purpose of taking possession, and that even if the tenant is absent (6). A tenancy at will is also determined by the death of either party (7), or by either party alienating his interest, provided and as soon as such alienation comes to the knowledge of the other (8). However, the Judicial Committee of the Privy Council, in circumstances from which it would seem clear that the tenant

(1) *Doe d. Jackson v. Wilkinson*, 3 B. & C. 413; *Doe d. Thompson v. Clark*, 8 B. & C. 717.

(2) See *Garrard v. Tuck*, per Wilde, C.J., 8 C. B. 251.

(3) *Goodtitle d. Gullaway v. Herbert*, 4 T. R. 680; *Right d. Lewis v. Beard*, 13 East, 210.

(4) Co. Litt. 55b.

(5) *Doe d. Bennett v. Turner*, 7 M. & W. 226; and *Turner v. Doe d. Bennett*, 9 M. & W. 643.

(6) Co. Litt. 55b; *Doe d. Moore v. Lawder*, 1 Stark. 308.

(7) Co. Litt. 55b; *Doe d. Stanway v. Rock*, 4 M. & G. 30; *Hogan v. Hand*, 14 Moore P. C. C. 310.

(8) *Disdale v. Iles*, 2 Lev. 88; S. C. sub. nom. *Hinchman v. Iles*, 1 Ventr. 247; *Doe d. Dixie v. Davies*, 7 Exch. 89; *Doe d. Davies v. Thomas*, 6 Exch. 854; *Pinhorn v. Souster*, 8 Exch. 763; and see per Creswell, J., *Melling v. Leak*, 16 C. B. 669; and Cole on Ejectment, 452.

at will must have known of a grant by the lessor at will of a lease for years to a third party, held that the effect of such lease was not to determine the tenancy at will, but only to give to the lessee for years a right to determine such tenancy. The point was not much discussed in the judgment, nor was the fact that the tenant at will must have known of the lease commented on; but it would seem, as the facts are reported, to be a decision that a demise to a third party by a lessor at will does not, even if communicated to the tenant at will, of itself determine the tenancy at will, and this is certainly inconsistent with the cases before alluded to (1).

There are expressions used in the judgments delivered in one case (2), which seem to imply that any acts on the part of an occupier amounting to admissions that he is only holding as tenant at will to the rightful owner, will prevent the statute from running against such owner's title. This, however, appears not to be correct, and in the case referred to, the facts would have warranted the judgment on another ground, namely, that during the twenty years preceding the action the owner had himself been from time to time in possession. Putting aside the effect of acknowledgments in writing under the 14th section of 3 & 4 Wm. IV. c. 27, or by a pecuniary payment which, as will be seen (3), stand on a peculiar footing, the difference between the operation before and since the statute of an admission by an occupier that his occupation was permissive, appears to be this. Before the statute such an admission was evidence that the occupation was permissive from the beginning, the effect of which, as showing that there never had been any adverse possession, was to prevent the then Statutes of Limitation from having any operation at all in such a case. Since the statute, such an

Admissions
by occupier
that occupa-
tion is
permissive.

(1) *Hogan v. Hand*, 14 Moore P. C. C. 310.

(2) *Doe v. Groves*, 10 Q. B. 486.

(3) See *post*, p. 346.

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admission is evidence, as before, that the occupation is permissive, but is no evidence to show when the tenancy began, nor does it operate in any way to set the statute running afresh; the effect is simply to bring the case within the 7th section, and to postpone the bar of the statute for one year beyond the time in which it would have taken effect, on the assumption that the occupation was not permissive, but that of a trespasser. If any such admission were allowed to operate as setting the statute running afresh, the provisions of the 14th section as to acknowledgments in writing would be virtually extended to acknowledgments made in any other way.

*Ley v.
Peter.*

The proposition laid down above seems warranted by the case of *Ley v. Peter* (1). That case, so far as it is material to this point, may be thus stated. The defendant had been in possession much more than twenty years, but a letter written within twenty years before action by his agent to the plaintiff's agent, offering to accept a lease of the land in question, was put in evidence, and it was contended that, even if this was not an acknowledgment within the 14th section (which it was held not to be), at any rate it was an admission of a tenancy at will, and that the plaintiff was not barred. It was held that, assuming it to be admissible as evidence against the defendant, and assuming it to be evidence of a tenancy at will, as to which there was a difference of opinion, yet it was no evidence as to when such tenancy began.

Tenancies
at will
reserving
rent.

Although the leaning of the Courts always is to construe tenancies for an undefined period, reserving yearly rents, as tenancies from year to year, yet such tenancies will, notwithstanding the reservation of such rent, be held to be strictly tenancies at will, where it is clear that such was the intention of the parties (2). If in the

(1) 3 H. & N. 101; 27 L. J. Exch. 239.

(2) *Doe d. Bastow v. Cox*, 11 Q. B. 122; and see *Richardson v. Langridge*, 4 Taunt. 128.

case of such a tenancy no rent has ever actually been paid up to the time when the question arises, such a tenancy would, it is submitted, be held to be within the provisions of this section; but, if rent has been paid, a difficulty arises. If such a case were held to be under this section without qualification, the result would be that, although the rent were regularly paid, the landlord's title would be barred at the expiration of thirteen years from the commencement of the tenancy, a result which never could have been intended; but, on the other hand, if it were held that the section did not apply at all to tenancies at will when rent is paid, a result would follow equally foreign to the spirit of the Act, namely, that if rent were paid for a short time, and then discontinued, the case would be left to the operation of the 1st section of 37 & 38 Vict. c. 57 alone, and time could not begin to run till the tenancy had actually determined, no matter how long a time elapsed between the last payment of rent and the actual determination of the tenancy. Lord St. Leonards remarks on this point (1): "It seems to be assumed in this section that no rent is paid," but he does not solve the difficulty suggested. It would certainly seem that no case of a tenancy at will where rent is actually paid was contemplated by this section, or else a provision, as in the case of tenancies from year to year, would have been inserted that time should run from the last payment of rent. It is suggested that the most satisfactory solution is this, that all tenancies at will, whether rent be paid or not, are within the 7th section, but subject to the provisions of the 35th section (2), and that a lessee at will is an "other lessee" within the meaning of that section; so that, every time rent is paid, the lessor at will and not the lessee at will is, as between themselves, in the receipt of the profits of the land for the purposes of

(1) Prop. Stat., p. 53*n*.

(2) See *post*, Part V. Ch. XXVI.

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—

the Act. In *Hodgson v. Hooper* (1), which is believed to be the only case where any question as to the operation of the statute on tenancies at will reserving rent has directly arisen, the plaintiffs, who had formerly been in possession of a piece of waste, as they contended, under a grant of the freehold from the lord of the manor, brought ejectment against the defendants, who claimed under a subsequent lord of the manor, to whom the plaintiffs had given up possession. It was held that in the circumstances there was no grant of the freehold, but that the plaintiffs had been in possession as tenants at will at a yearly rent of five shillings, which appeared to have been regularly paid. It seems to have been assumed that this tenancy was within the 7th section, and judgment was given for the defendant on grounds which would have been equally valid, had there been no rent; it was not, therefore, absolutely necessary to give a decision on the effect of the payment of rent; but Cockburn, C.J., treated it as strong evidence that the occupation continued permissive, and not of the nature contended for by the plaintiffs, and after other remarks on this point, he said: "We cannot but draw the inference that each successive payment of five shillings was a fresh acknowledgment that the land was held by the permission of the lord of the manor." This may be considered as a judicial opinion that each payment was an acknowledgment which, as such, set the time running afresh; but, as the remark was directed against the contention that the plaintiffs had been in possession as grantees of the freehold, it did not necessarily imply such a proposition, nor was that view necessary to support the decision, and, notwithstanding this remark, it is submitted that the more correct view of the operation of such payments is the one suggested above.

Pecuniary
acknow-
ledgments
of title.

Where a person without apparent title has had posses-

(1) 3 E. & E. 149; 29 L. J. Q. B. 222.

sion of land for more than thirteen years, and then gives an acknowledgment by payment to the owner, the owner's right of action will have been barred, and, therefore, his title extinguished before the acknowledgment, and it seems clear that such payment cannot alone have the effect of restoring the title. However, such a payment, if made before the thirteen years have expired, might set the statute running afresh in one of two ways, either by showing that the land was held under a tenancy at will reserving rent, of which this rent was a payment, or as evidence that the previous occupation had been a tenancy at will, and that this tenancy at will was determined and a new tenancy created at the time when the payment was made.

If a person enters on land under a lease which is invalid by the Statute of Frauds, a tenancy at will is created (1). But if a person enters on land under a lease which is void *ab initio*, and pays no rent, such a person is not a tenant at will, but is in possession without any title at all, and the statute will run in his favour from the date of his entry; but if any rent, however small, is reserved by the lease and paid by such a person, such payment creates a tenancy from year to year, and, as long as such payment is made, the statute will not run (2).

Entry
under a
void lease.

It was at one time considered doubtful whether the 7th section did not apply to tenancies at will which had actually determined before the passing of the Act 3 & 4 Wm. IV. c. 27 (3); the cases of *Doe d. Bennett v. Turner* (4), and *Turner v. Doe d. Bennett* (5), were considered

Tenancies
at will
determined
before Act
3 & 4
Wm. IV.
c. 27
passed.

(1) 29 Car. II. c. 3, s. 1. See *Goodtitle d. Gallaway v. Herbert*, 4 T. R. 680.

(2) *Per* Lord Selborne, *President and Governors of Magdalen Hospital v. Knotts*, 4 App. Cas. 324, 335; *Bunting v. Sargent*, 13 Ch. D. 330.

(3) *Doe d. Stanway v. Rock*, 4 M. & G. 30; *Doe d. Goody v. Carter*, 9 Q. B. 863; 2 Sm. L. C. 9th. ed. 763; and see *Doe d. Angell v. Angell*, 9 Q. B. 328, 359.

(4) 7 M. & W. 226.

(5) 9 M. & W. 643.

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authorities that the section did so apply, because otherwise in those cases it would not have been necessary to discuss whether a new tenancy was or was not created. The point, however, was not taken in those cases by counsel or by the judges. It was ultimately settled that the section had no operation whatever on tenancies at will which had actually determined before the Act passed, and that in such a case time began to run from the determination of the tenancy (1).

If at the time when the Act 3 & 4 Wm. IV. c. 27 was passed, a tenancy at will was in existence which had lasted more than twenty-one years, or the twenty-one years expired in less than five years after the passing of the Act, the lessor was by the operation of the 15th section not barred till the end of the five years (2).

Where
tenancy at
will is
determined
and new
one created.

Where a tenancy at will is actually determined before the thirteen years are expired, and a new tenancy at will is created, the 7th section does not apply to the first tenancy, and its effect must be considered with reference only to the last tenancy at will created before the question of title is raised (3).

Where no
new
tenancy at
will is
created.

It was decided in *Randall v. Stevens* (4) that, where a tenancy at will was actually determined within twenty-one years (while sect. 2 of 3 & 4 Wm. IV. c. 27 was in force), and the lessor actually took possession, even if only for a moment, and the tenant resumed possession, the case was unaffected by the 7th section. In such a case time runs not from the end of the first year of the tenancy, but from the subsequent dispossession, the title of the owner being revested by his taking possession,

(1) *Doe v. Bold*, 11 Q. B. 127; and see *Doe v. Page*, 5 Q. B. 767; *Doe v. Thompson*, 6 A. & E. 721.

(2) *Doe d. Dayman v. Moore*, 9 Q. B. 555.

(3) *Doe d. Bennett v. Turner*, 7 M. & W. 226; 9 M. & W. 643; *Doe d. Goody v. Carter*, 9 Q. B. 863; *Doe d. Stanway v. Rock*, 4 M. & G. 30; *Hodgson v. Hooper*, 3 E. & E. 149; 29 L. J. Q. B. 222; *Randall v. Stevens*, 2 E. & B. 641; 23 L. J. Q. B. 68; *Locke v. Matthews*, 13 C. B. N. S. 753; 32 L. J. C. P. 98.

(4) 2 E. & B. 641; 23 L. J. Q. B. 68.

and the person who was tenant being from that moment in as a mere trespasser. It may also be considered as settled that, where a tenancy at will is actually determined more than a year after its commencement, and the tenant remains in possession without a fresh tenancy at will being created, time does not run from the actual determination of the tenancy, but from one year after the commencement of the tenancy at will; it runs, in fact, as if the actual determination had never taken place. This was clearly the opinion of the judges in *Doe d. Bennett v. Turner* (1), and *Turner v. Doe d. Bennett* (2), and of Erle, C.J., in *Locke v. Matthews* (3), and it was expressly so decided by the Court of Queen's Bench in *Doe d. Goody v. Carter* (4), and by the Judicial Committee of the Privy Council in *Day v. Day* (5); the doubts expressed on this point by the Court of Queen's Bench in *Randall v. Stevens* (6), and by Willes, J. (7), may now be disregarded.

The words of the section mean that one of two alternatives, either the actual determination of the tenancy at will within a year of its commencement or the expiration of one year from its commencement, is enough to set the statute running, and it is in accordance with the general principles of the statute that, when once time has begun to run, the bar will not be postponed, and time set running afresh merely by the happening of an event which, if time had not been then running, would in itself have set it running; so that, if the year has expired before the actual determination of the tenancy, the actual determination of the tenancy has no effect whatever for the purposes of the statute. It will

(1) 7 M. & W. 226.

(2) 9 M. & W. 643.

(3) 13 C. B. N. S. 753, 761; 32 L. J. C. P. 98, 100.

(4) 9 Q. B. 863.

(5) L. R. 3 P. C. 751.

(6) 2 E. & B. 650, 652.

(7) *Locke v. Matthews*, 13 C. B. N. S. at p. 763; 32 L. J. C. P. 101.

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be seen, too, that if time began to run afresh from the actual determination of the tenancy at any time before the expiration of the thirteen years, it would follow that the bar would be postponed for twelve years merely by the lessor at will giving notice to determine the tenancy at any time during the period running against him, though such notice was in no way acknowledged or was even repudiated by the lessee at will, or by the lessee at will dying, or even by his alienating and so purporting to treat the property as his own, results which could not have been intended.

What
amounts
to taking
possession
or creating
a new
tenancy-at-
will.

It has been held that where an owner went into a house in the possession of a trespasser, and took a stone out of the wall, saying that he thereby took possession of the whole house, but the owner did not actually turn out the trespasser, who continued in possession, the owner did not, by this transaction, set time running afresh in his favour, because, as he never turned out the trespasser, he never actually obtained possession himself, and his title therefore was not revested (1). If the occupier had been tenant at will, the decision that the title was not revested would still be applicable, but the owner would clearly have determined the tenancy; and, as there was nothing whatever done to create a new tenancy, the owner would have been equally barred. Where the owner has done some act determining the tenancy at will, the statute will not thereby be set running afresh unless the owner has at the same time resumed the possession of the property, or a new tenancy has been created.

*Doe v.
Groves.*

In *Doe d. Groves v. Groves* (2) the facts, so far as is material for the present discussion, were these. One William Hart became, on the death of his father in 1798, entitled as heir at law to a house and lands, the

(1) *Doe d. Baker v. Coombes*, 9 C. B. 714; 19 L. J. C. P. 306. See *Worsam v. Vandenbrande*, 17 W. R. 53.

(2) 10 Q. B. 486.

premises in question, and from that time lived on the premises, first with his mother and afterwards with her and her second husband, the defendant, till 1805; William Hart then left, but his mother and the defendant continued to reside on the premises, and between 1805 and 1841 William Hart occasionally resided two or three weeks at a time on the premises as a member of the family, and he so resided at the death of his mother in 1841, and for three weeks afterwards. In 1842, at the request of the defendant, William Hart executed a mortgage of the premises to the plaintiff, the plaintiff's solicitor saying that the mortgage was not good without his concurrence, and the money advanced on the mortgage was paid to the defendant with William Hart's assent. The defendant remained in possession; and on ejectment being brought by the mortgagee in 1846, Coltman, J., directed the jury to find a verdict for the plaintiff, and, on an application by the defendant for leave to enter a nonsuit, the Court of Queen's Bench, who had power to draw inferences of fact, held that the mortgagee's title was good. Denman, C.J., and Patteson, J., with the concurrence of Coleridge, J., based their decision on the ground that the defendant's acts amounted to an admission of tenancy. Erle, J., said: "The lessor of the plaintiff was clearly entitled and his title recognized in the plainest manner by the defendant. But the defendant's answer is that he occupied as apparent owner for twenty years. To this the reply is that the real owner came now and then and lived with him. If I had been in the place of the jury, I should have held that this showed that the defendant was in reality tenant at will." The mere fact that the defendant's occupation was a tenancy at will would not have prevented the statute running in his favour, but the facts of the case fully warranted the inference either that every time the son came there to live he actually resumed possession, which was quite consistent with the defendant and his

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wife remaining in the house with him, or at any rate that he determined the existing tenancy at will, and by allowing the defendant and his wife to remain in as before when he left, he created a fresh tenancy every time he left.

*Allen v.
England.*

In *Allen v. England* (1), which was an action of trespass for an entry upon land of which the defendant claimed to be owner, there was evidence that the occupation of the plaintiff began by the permission of the defendant, and also that the defendant came from time to time to see the plaintiff and went on the land with him, and told him what trees to lop and what repairs were required. Erle, C.J., told the jury that if they believed that evidence, they should find for the defendant. His Lordship observed that it might be taken that the plaintiff had the beneficial occupation for more than twenty years, but that in his judgment, every time the defendant set foot on the land, it was so far in his possession that the statute would begin to run from the last time he set foot on it. The jury found for the defendant, and the plaintiff had leave to move. This he did, but without effect, but the case at that stage does not seem to be reported. Where a tenancy at will has been determined by the owner resuming occupation, but the person who was tenant at will continues in possession, it may be important to consider whether such person is in possession as a trespasser or under a new tenancy at will; for if a new tenancy at will is created, time will not begin to run against the owner till one year has elapsed from the commencement of the new tenancy, whereas if the possession is that of a mere trespasser, time will run from the commencement of such possession.

Acts of ownership, however, which would be sufficient to show a determination of an existing tenancy at will and the creation of a new one, where the occupation was

(1) 3 F. & F. 49.

permissive, might be no evidence against the occupier that his holding was permissive. In such a case, if there is no proof *aliunde* that a tenancy at will was in existence at the time of such acts, they would have no effect in preventing the operation of the statute, but would amount to mere entries provided for by the 10th section (1).

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Lord St. Leonards, in his work on the Property Statutes (2), appears to approve of the judgment in *Doe d. Groves v. Groves*, and quotes it as an authority for the proposition that, although a man has been in possession for twenty years as apparent owner, yet the rightful owner may show that the possession was not such as the statute will give effect to. But this is not quite accurate, for the possession of the rightful owner at intervals, whatever its effect otherwise may be, cannot change the nature of the possession of the actual occupier between such intervals. The doctrine of adverse possession is, as before observed (3), done away with by the Act 3 & 4 Wm. IV. c. 27. The effect of the 2nd section of 3 & 4 Wm. IV. c. 27 (now the 1st section of 37 & 38 Vict. c. 57) is to put an end to all questions and discussions whether the possession in favour of which the statute is to operate be adverse or not (4). The question is, whether the prescribed period has elapsed since the right accrued, whatever be the nature of the possession. And the 7th section of 3 & 4 Wm. IV. c. 27 seems especially framed to prevent the principle being infringed by the incidents of a tenancy at will, and therefore makes it, for the purposes of the Act, totally immaterial whether an occupation is permissive or not, except for the period of one year after its commencement, and it seems clear that, subject to that and to exceptions as between landlord

Adverse
possession.

(1) *Brassington v. Llewellyn*, 27 L. J. Exch. 297; at *Nisi Prius*, 1 F. & F. 27.

(2) Page 26.

(3) Part V. Ch. I. p. 274.

(4) *Nepean v. Doe d. Knight*, 2 M. & W. 894, 911; *Culley v. Doe d. Taylerson*, 11 A. & E. 1008, 1015.

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and tenant, whenever and so long as the owner is out of possession and another person in possession, the statute must always be running in some way or other against the owner (1).

Encroach-
ment by
tenant.

Where a person who held land under a lease for ninety-nine years encroached with the consent of his landlord given by word of mouth on the landlord's land and it was orally agreed that the encroachment should be treated as if comprised in the lease, and no rent other than the rent reserved by the lease was ever paid, it was held that such assent did not create a tenancy at will within the 7th section, and did not prevent the operation of the ordinary rule of law that an encroachment made by a tenant must be taken to be made for the benefit of the landlord and treated as part of the demised premises (2).

Occupation
by a
servant.

There are cases in which the possession of the actual occupier is not an independent possession, but the possession of the owner himself, so that the owner is in fact in virtual possession through the occupier. This is analogous to the rightful owner being in receipt of the profits through a bailiff (3), and happens where the occupier is a servant of the owner and occupies in his capacity of and for the purpose of performing his duties as such servant, as, for example, a gatekeeper at a lodge or a gardener occupying as such a gardener's cottage. This has been explained in some Irish cases (4). In the case of *Lessee of Moore v. Doherty* the facts were rather peculiar, and it might perhaps be thought to carry the idea of virtual possession through the actual occupation of another farther than can be fairly done; but whether the facts in that case did or did not warrant the conclusion that the owner was in virtual possession, it would seem clear that, if the judges

(1) See *Mayor of Brighton v. Guardians of Brighton*, 5 C. P. D. 368.

(2) *Whitmore v. Humphries*, L. R. 7 C. P. 1.

(3) Part V. Ch. III. p. 301.

(4) Per Pennefather, B., in *Lessee of Ellis v. Crawford*, 5 Ir. L. R. 404; *Lessee of Moore v. Doherty*, 5 Ir. L. R. 449; *Lessee of Montmorency v. Walsh*, 4 Ir. L. R. 254.

had not thought the facts justified such a conclusion, they would have held the owner barred.

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A *cestui que trust* in possession of property is at law considered to hold as tenant at will to his trustee, and in some cases a mortgagor is deemed to hold the same relation towards a mortgagee (1). In such cases, if the first part of the 7th section of 3 & 4 Wm. IV. c. 27 had stood alone, its effect might have been to extinguish the title of the mortgagee twenty-one (now thirteen) years after the date of the mortgage, and to bar the title of a trustee at the end of the same period after the *cestui que trust* first went into possession. To prevent this effect the proviso is inserted "that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will within the meaning of this clause to his mortgagee or trustee." As regards mortgagees, this proviso is seldom of importance, for, where interest has been paid, their right is now by 7 Wm. IV. and 1 Vict. c. 28 deemed to accrue at the date of the last payment of interest. It has been said that, where the mortgage debt has been paid off, but no reconveyance executed, a mortgagor in possession thereupon becomes a tenant at will to the mortgagee, and the legal estate of the mortgagee is extinguished at the end of thirteen years from the time of payment (2). The effect of the proviso in the 7th section on the title of trustees is unaffected by 7 Wm. IV. and 1 Vict. c. 28. By the terms of the proviso a *cestui que trust* is for the purposes of the 7th section of 3 & 4 Wm. IV. c. 27 not to be deemed tenant at will to his trustee; the proviso leaves the *cestui que trust* tenant at will to his trustee for all other purposes in all cases in which, before the passing of the Act, he would have been considered to hold as such tenant. The meaning of the proviso is that "the right of entry of a trustee against his *cestui que trust* shall not be deemed to

Possession
by *cestui
que trust*.

(1) See Watkins on Conveyancing, by Morley & Coote, 8th ed. p. 13, *et seq.*

(2) *Sands to Thompson*, 22 Ch. D. 614.

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have accrued at the expiration of one year next after the commencement of the tenancy; and the exception seems to be introduced in order to prevent the necessity of any active steps being taken by a trustee to preserve his estate from being destroyed, as in the case of an ordinary tenancy at will, by mere lapse of time. The intention appears to be to put the estate of a trustee in a better state in this respect than that in which the estate of an ordinary lessor is as against his tenant at will" (1). Although a *cestui que trust* who is in possession with the consent of his trustees may in general be regarded as his tenant at will, yet this doctrine only applies to the case where the *cestui que trust* is the actual occupant. If he is only allowed to receive the rents or otherwise deal with the estate in the hands of the occupying tenants, he stands in the relation merely of an agent or bailiff of the trustees who choose to allow him to act for them in the management of the estate. And the consequence is that, if the actual occupier is under such circumstances permitted to occupy for more than twenty years without paying rent, the trustees will lose their title (2).

The proviso to the 7th section has been decided to apply only to express trusts (3), or rather to actual direct trusts, and not to implied trusts or to such possible eventual trusts as may, in case certain facts are established in evidence, be declared in a Court of Equity (4). The distinction rests on a broad principle that when the trustee and the *cestui que trust* have but one interest, namely, that of the *cestui que trust*, the possession of the *cestui que trust* is consistent with the title of the trustee, and will not operate to bar the trustee's title; but where, on the other hand, the interest of the person who has the

(1) *Garrard v. Tuck*, 8 C. B. 231, 253.

(2) *Melling v. Leak*, 16 U. B. 652, 669.

(3) *Doe d. Stanway v. Rock*, 4 M. & G. 30; Car. & M. 549.

(4) *Drummond v. Sant*, L. R. 6 Q. B. 763; 41 L. J. Q. B. 21; *Sands to Thompson*, 22 Ch. D. 614; *Locking v. Parker*, L. R. 8 Ch. 30.

legal estate, and that of the person beneficially entitled, are opposed to one another, the possession of the latter, who is the owner in equity, is such as ought on the general principle of the statute to bar the title of the former at law.

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A person might be tenant at will at law, but yet have a right to a lease in equity; in such a case the right of the landlord would not be barred in equity (1).

Tenant at
will having
a right in
equity to
a term.

(1) See *post*, Part V. Ch. IX. p. 364.

CHAPTER IX.

TENANCIES FROM YEAR TO YEAR (3 & 4 WM. IV.
c. 27, s. 8).PART V.
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THE operation of the statutes 3 & 4 Wm. IV. c. 27, and 37 & 38 Vict. c. 57, on tenancies from year to year, is regulated by the 8th section of the former Act, which is as follows:—

Section 8
of 3 & 4
Wm. IV.
c. 27.

“Where any person shall be in possession or in receipt of the profits of any land or in receipt of any *rent*, as tenant from year to year, or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims to make an entry or distress, or to bring an action to recover such land or *rent*, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen).”

In this section the word *rent* occurs in two different senses, being used twice in the beginning of the section to mean a rent-charge or inheritance in rent, as in the 3rd section, and once in the latter part to signify the reserved rent payable in respect of a tenancy (1). Where land is held on the condition of performing any service for which a distress may be made, such service is a rent payable in respect of the tenancy within the meaning of this section (2).

(1) *Baines v. Lumley*, 16 W. R. 674.

(2) *Doe d. Edney v. Benham*, 7 Q. B. 976. See *Doe d. Robinson v. Hinde*, 2 Moo. & Rob. 441.

It is clear that the words of the section "without a lease in writing" apply to a person holding as tenant from year to year as well as to a person holding for any other period, and the section includes all cases of tenancies for recurring periods, which are not commenced under a lease in writing.

The wording of this section is so similar to that of the 7th that on more than one point the cases decided on the 7th section may be considered applicable to the 8th. In *Doe v. Sumner* (1) the question arose how far the 8th section was retrospective, and it was contended that the section did not apply to tenancies from year to year which had commenced before the passing of the Act. The case of *Doe v. Page* (2), decided on the 7th section, was relied on as an authority, but does not support this view. In *Doe v. Sumner* (1) the defendant's father had been admitted tenant from year to year in 1814, and the last payment of rent was made in March, 1824. The defendant's father died a few years before the commencement of the action, leaving the defendant in possession of the premises. The demise in ejectment was laid on the 30th June, 1844. It was held that, as the defendant's father was in possession of the land as tenant from year to year after the passing of the Act, the period of limitation ran from the last receipt of rent from him in March, 1824, and therefore expired in March, 1844, and that the ejectment was consequently brought too late.

If a tenancy from year to year or any other tenancy for recurring periods is created under a lease in writing, the provisions of the 8th section do not apply, and the case must be considered under the clauses of the Act generally applicable to leases and reversions. Before the passing of the Act, if a person had once been admitted as tenant from year to year, no right of entry accrued till the tenancy had been determined by a notice

Tenancy
from year
to year
under lease
in writing.

(1) 14 M. & W. 39.

(2) 5 Q. B. 767.

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to quit or otherwise; and consequently a tenant might remain in possession for an indefinite period without paying rent, and yet gain no title against the person who let him into possession. This would still seem to be the case, where the tenant has entered under a lease in writing.

The non-payment of rent for many years, coupled with absence of proof of any rent being demanded, is of itself evidence from which a jury may, if they please, presume the determination of a tenancy from year to year (1). If a person who had entered into possession of land as tenant from year to year under a lease in writing were to rest his title on the statute, it would be necessary for him to show that the tenancy had determined twelve years or more before action, and the jury might, as in *Stagg v. Wyatt* (1), presume that such was the case from the fact that a considerable number of years had elapsed without any rent having been paid or demanded. The question for the jury to decide would be whether the length of time which had elapsed without payment or demand of rent satisfied them that the tenancy had been determined twelve years or more before action.

In the case of *Jackson v. McMaster* (2), which was recently decided by the Court of Appeal in Ireland, A. B. was in possession of lands as tenant from year to year, and died intestate some time before 1866; no administrator of A. B. was ever appointed, but his widow and one of the children remained in possession, and one of the sons, H. B., was accepted as tenant by the landlord, and receipts were given to him in his own name for the rent. It was held that at the expiration of twenty years from the death of A. B. his outstanding tenancy from year to year was extinguished, and that the tenancy of H. B., which up to that time was a tenancy by estoppel, only became then a tenancy in interest.

(1) *Stagg v. Wyatt*, 2 Jur. 892.

(2) 28 L. R. Ir. 176.

A lease in writing, to come within the meaning of the 8th section, must be an instrument in writing which operates as a lease and passes an interest; it is not sufficient that there is a writing which is evidence of the terms of the holding or which binds the tenant; it must be also of such a nature as to be binding on the lessor. This was decided in *Doe d. Lansdell v. Gower* (1). In that case B., being in possession of a cottage belonging to the parish of P., signed in 1824 an agreement which purported to be a demise of the cottage to him by the churchwardens and overseers at a rent of 1s. 6d. per week, B. to quit on one month's notice being given. This agreement was only signed by one of the overseers; neither of the churchwardens signed it, and there was nothing to show that the one overseer who had signed it did so as agent for the other parties by whom the lease was expressed to be made. B. never paid any rent or made any acknowledgment; the defendant purchased the cottage from him. In 1851 the churchwardens and overseers for the time being brought an action of ejectment to recover the property. It was held that, as the agreement above-mentioned did not bind the churchwardens and overseers or pass any interest to B., although it might be binding on him, it was not a lease in writing within the meaning of the 8th section, and therefore that the action was barred.

The correctness of this decision has been questioned by Lord St. Leonards (2). He observes:—"This may lead to much inconvenience. The statute speaks of a person holding as a tenant, etc., without any lease in writing, and where a man has entered and enjoyed under what purports to be a lease in writing, and has executed the instrument in the character of lessee, it might well have been held that the case did not fall within the 8th section. The decision points out the necessity of

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What is a
lease in
writing?

(1) 17 Q. B. 589.

(2) Prop. Stat. 2nd ed. p. 61.

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enforcing the actual payment of small rents; the house which the rent represented was no doubt considered by the parish as part of the relief afforded to the pauper tenant; this decision may have an important operation on the statute (1) requiring all leases to be by deed." It should be recollected that, under the joint operation of the Statute of Frauds (2) and the statute (1) referred to, a lease not exceeding the term of three years, in order to be valid *at law*, must be by deed if the rent reserved is less than two-thirds of the improved value.

Payment of
rent after
lapse of
statutory
period.

In *Bunting v. Sargent* (3) Jessel, M.R., held that when a tenant from year to year without a lease in writing had occupied land for more than twenty years without payment of rent, but paid some arrears of rent in 1873, after the twenty years had expired, the reversioner's title was not barred by 3 & 4 Wm. IV. c. 27. His Lordship said, in commenting on the 8th section, "There are two periods mentioned when the right of the reversioner can first accrue: if no rent is paid, then it accrues at the end of the first year or other period; if rent is paid, then it accrues at the last time when any rent shall have been received. Therefore the plaintiff is right in saying that he has only to prove a payment within twenty years of the commencement of the action." This view, it is submitted, cannot be supported. In 1873, when more than twenty years had elapsed since the last payment of rent, the title of the plaintiff was extinguished by the 34th section, and he had become an absolute stranger to the property. The payment of a sum of money as rent in that year could not give him a new title against which the statute would commence to run afresh (4). If the facts were doubtful, payment of rent in 1873 might have been evidence that rent had been paid, or some other act done

(1) 8 & 9 Vict. c. 106, s. 3.

(2) 29 Car. II. c. 3, s. 2.

(3) 13 Ch. D. 330.

(4) See *post*, Ch. XXV. *Sanders v. Sanders*, 19 Ch. D. 373.

within the preceding twenty years, sufficient to keep the landlord's title alive. But the decision was not given on any such ground.

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Where a certain sum is due periodically from a tenant from year to year by way of rent, and it is proved that a similar sum has been paid from time to time, it becomes important to consider whether such payments were made for rent or on some other account. In the *Attorney-General v. Stephens* (1) the property claimed had been originally let on lease from year to year at a rent of £6; the occupier of the land had paid that sum annually, always believing it to be a rent-charge, and he did not know that the land had been originally held as leasehold by his predecessors in title, while on the other hand the claimants had always received the £6 as rent reserved, and had entered it in their books as such. The claimants failed on another ground, but Cranworth, L.C., in delivering judgment, said (2): "Where the tenancy is, as in this case, disputed, the circumstances connected with the annual payments are evidently most important, for if the person paying made the payment expressly or impliedly on account of something else than rent of land of which he was the tenant, this would not be a payment of rent within the meaning of the clause to which I have referred. It is therefore manifestly most important to know all the circumstances which have attended the annual payments of £6, which have been made for the last twenty years, in order to enable us to come to a fair conclusion on the points whether they have been payments of rent in respect of the tenancy now insisted on (3); for, if not, the defence founded on the Statute of Limitations is a complete bar."

Rent must
be paid as
such.

Payment of rent to a person who originally receives as agent is receipt by the true owner until it is proved that

Payment to
an agent.

(1) 6 De G. M. & G. 111, 136.

(2) 6 De G. M. & G. pp. 146, 147.

(3) See also *Doe d. Newman v. Goddell*, 5 Jur. 170; 4 Q. B. 603n.

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—

the character in which such person received the rent was changed, even although such person has for more than twenty (now twelve) years paid over nothing to the true owner (1). If such person receive the rents while the real owner is unascertained, the real owner will not be barred if he ratifies the act of the agent within a reasonable time after it is ascertained who the real owner is (2).

Possession
by under-
tenant.

Where in ejectment it was proved that rent had within the twenty years been paid in respect of the premises in question to the lessor of the plaintiff by a third party, and that the defendant within the twenty years had admitted that he held as tenant to such third party, but there was no evidence of payment of rent to any one by the defendant himself, the lessor of the plaintiff was held entitled to recover, on the ground that an under-tenant cannot be permitted to dispute a title which is valid against the person of whom he holds (3).

Equitable
right to a
term.

Before the Judicature Act, 1873, where a person occupied land for more than twenty years in such circumstances that he was at law a tenant from year to year without any lease in writing, while he had a right in equity to a long term of years, and no payment of rent or acknowledgment was made during all that time, the right of the landlord in law was barred by the statute at the end of twenty years; but, as in equity the landlord had been only entitled throughout to a reversion expectant on a subsisting lease, the landlord's equitable title was not barred, and he only lost the right to recover arrears of rent which accrued more than six years before action (4). It has been said that now, since the Judi-

(1) *Smith v. Bennett*, 30 L. T. N. S. 100; *Attorney-General v. Corporation of London*, 2 Macn. & G. 247. See *Lyell v. Kennedy*, 14 App. Cas. 437. *In re Hobbs*. *Hobbs v. Wade*, 36 Ch. D. 553; *McAuliffe v. Fitzsimons*, 28 L. R. Ir. 29.

(2) *Lyell v. Kennedy*, 14 App. Cas. 437.

(3) *Doe d. Spencer v. Beckett*, 4 Q. B. 601.

(4) *Archbold v. Scully*, 9 H. L. 360.

capture Act, 1873, a tenant holding under an agreement for a lease of which specific performance would be decreed, stands in the same position as to liability as if the lease had been executed; he is not a tenant from year to year, but holds under the agreement, and every branch of the Court must now give him the same rights (1).

If a person enters into possession of land under a lease which is void *ab initio* and pays rent, he becomes a tenant from year to year, and the statute will not run in his favour so long as he pays rent (2). But, if no rent is paid, the statute begins to run in favour of a person in possession under a void lease from the date when the possession begins (3).

(1) *Walsh v. Lonsdale*, 21 Ch. D. 9, p. 14. See *Lowther v. Heaver*, 41 Ch. D. p. 264; *Foster v. Reeves* (1892), 2 Q. B. 255.

(2) *Webster v. Southey*, 36 Ch. D. 9; *Bunting v. Sargent*, 13 Ch. D. 330.

(3) *President, &c., of Magdalen Hospital v. Knotts*, 4 App. Cas. 324.

CHAPTER X.

LEASES IN WRITING (3 & 4 WM. IV. C. 27, s. 9).

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Leases in
writing.

WHERE land has been demised for a term of years at a rent reserved, the title of the landlord to the reversion expectant on the lease is, as we have seen, unaffected by the mere fact that the tenant omits to pay rent for any number of years during the existence of the lease (1). But the 9th section of 3 & 4 Wm. IV. c. 27 provides a limitation for the case where a tenant holding under a lease in writing at a rent of twenty shillings a year or upwards pays the rent, not to the person rightfully entitled to the reversion, but to a wrongful claimant. The section is as follows:—

Sect. 9
of 3 & 4
Wm. IV.
c. 27.

“When any person shall be in possession or in receipt of the profits of any land or in receipt of any *rent* by virtue of a lease in writing by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or *rent* in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or *rent*, subject to such lease, or of the person through whom he claims, to make an entry or distress or to bring an action after the determination of such lease

(1) See *ante*, Part V. Ch. V. p. 329.

shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled."

In this section the word *rent* where in italics means rent-charge existing as an inheritance, in the rest of the section the word means rent reserved (1).

The section is confined to the case of a reversion expectant on a lease in writing, reserving a rent of not less than twenty shillings per annum. It was, no doubt, intended to apply to all cases not provided for by the 7th and 8th sections of 3 & 4 Wm. IV. c. 27, except the case where there is a lease in writing at a smaller rent.

Before the passing of the statute 3 & 4 Wm. IV. c. 27, if a valid lease was subsisting, the receipt of the reserved rent by a person claiming the reversion adversely to the rightful landlord, did not take away the right of the latter to enter at the determination of the lease (2); at least, if the lessor had not knowledge of the tenant's act, or did not acquiesce therein. But if the lessor had notice of the lessee's disavowing his title and attorning to a wrongful claimant and yet took no step to assert his own title, the lessor was, it seems, barred by statute from recovering the land at the end of the lease (3). A lease that was in law absolutely void or that only subsisted as a trust to attend the inheritance could not prevent the statute from running to protect the adverse possession or give the reversioner any new right of entry at the end of the term (4). Even now, where there is a valid lease in writing and there is not an annual rent, amounting to twenty shillings, reserved

Law before
the statute.

(1) See *Shaw v. Keighron*, 3 Ir. R. Eq. 574.

(2) *Doe v. Danvers*, 7 East, 299, 320; *Bushby v. Dixon*, 3 B. & C. 298, 307.

(3) *Hovenden v. Annesley*, 2 Sch. & Lef. 624, 625.

(4) *Taylor v. Horde*, 2 Sm. L. C. 9th ed. p. 632. See *President, &c., of Magdalen Hospital v. Knotts*, 4 App. Cas. 324.

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thereon, neither the receipt of rent by a person wrongfully claiming the reversion, nor his obtaining actual possession of the land, will prevent the reversioner's right of entry from accruing at the expiration of the lease. It was observed by the Real Property Commissioners that, where no rent or only a nominal rent is reserved, very slight negligence can be imputed to the reversioner in merely not requiring a recognition of his title from the tenant. Any rent less than twenty shillings a year may, for this purpose, be considered nominal (1).

When land is subject to such a lease as is spoken of in this section, the reversioner's right to recover possession accrues, and therefore the statute begins to run against him, not at the time when any person gets possession and claims to be entitled to the fee, but at the time when the lessee first pays rent to a person claiming wrongfully in reversion immediately expectant on such lease (2). Where, however, an estate has been on lease, and within twelve years of the expiration of the lease, the rent has been received by a person wrongfully claiming the immediate reversion, so that the statute has begun to run against the rightful reversioner, if the person who so wrongfully received the rent obtain possession of the land at the expiration of the lease, and retain it till the period of twelve years is completed from his first receipt of rent, the title of the rightful reversioner would be barred. For the right of the latter to recover possession is deemed to have accrued at the time of the first receipt of rent by the wrongful claimant, and twelve years from that period have elapsed without its being enforced. The law was the same in this respect before the passing of the statute (3).

Receipt
must be
wrongful.

The receipt of rent by a person other than the reversioner will not have the effect of setting the statute running for the protection of such person, unless his claim

(1) First Report of Real Property Commissioners (1829), p. 47.

(2) *Chadwick v. Broadwood*, 3 Beav. 308, 316.

(3) *Cholmondeley v. Clinton*, T. & R. 107.

to be entitled to the reversion is wrongful, and in pleading a defence under this section it is necessary to state that the person by whom the rent was received claimed the reversion wrongfully (1); otherwise he might have made his claim as a mortgagee or lessee or in some other capacity not adverse to the rightful reversion. For instance, in the case of *Shaw v. Keighron* (2), property had by a marriage settlement been conveyed to trustees on trust for the husband for life and on his death to be charged with the wife's jointure of £6 a year, and there was an ultimate trust in favour of the children of the marriage; power was given to the husband and his wife to lease the property, and they leased it, reserving a rent of £10 16s. to them, their heirs and assigns. After the death of the settlor the widow received the whole of the rent of the demised property until her death. It was held by Walsh, M.R., that the receipt of the rent by the widow was not a receipt by a person "wrongfully claiming" within the meaning of the 9th section, and that, as the widow was entitled to receive the greater part of the rent in her own right as her jointure, she must be presumed to have received the balance for her children and by their authority. If a tenant assert a claim to the reversion expectant on his lease, and on the ground of such claim discontinue to pay rent to his lessor, time will not run under the section against the right of the lessor. To bring a case within the provisions of this section there must be payment to a third party (3).

Where the reversion expectant upon a lease was severed in 1872 and a small part of the land out of which the rent under the lease issued was conveyed to the plaintiff, and the rent was never apportioned and no rent was ever paid to the plaintiff in respect of the piece of land conveyed to him, but the whole of the rent was paid as before to the

(1) *Sloane v. Flood*, 5 Ir. C. L. R. 75.

(2) 3 Ir. R. Eq. 574.

(3) *Archbold v. Scully*, 9 H. L. 360.

PART V.
CH. X.
—

original reversioner till 1875, when the original reversioner conveyed his reversion to the defendant who had occupied as lessee the whole of the land comprised in the lease, it was held, on the expiration of the lease in 1891, that the payment to the original reversioner after 1872 was not a payment to a person wrongfully claiming to be entitled to plaintiff's part of the land within sect. 9 of 3 & 4 Wm. IV. c. 27, and that time did not begin to run against the plaintiff until the lease expired (1).

The words "wrongfully claiming" in sect. 9 are not to be confined to an intentional and improper claim of the rent, and do not exclude the case of a claim made by mistake, but refer to any person not entitled who makes a claim to the rent against the person who is entitled. Thus, where a person received the rents of property to which he was entitled, but by mistake accounted for them to his mother who was not entitled, it was held that the receipt of the rent by the mother was a receipt by a person wrongfully claiming to be entitled (2).

Receipt of
rent from
sub-lessee.

Where land is in the occupation of a tenant, holding at a reserved rent from the immediate reversioner who, in his turn, is a lessee at a head rent under a reversioner in fee, if the sub-lessee pays the head rent to the superior landlord, but nothing is either received or paid by the mesne lessee, it seems that the receipt of rent by the superior landlord from the sub-lessee may be, but is not necessarily, adverse to the immediate reversioner's title. Whether it is so or not, must be determined from the other circumstances of the particular case (3). But it seems that the presumption is rather in favour of the fact that the payment of the head rent by the tenant to the ultimate reversioner is made under an arrangement with the mesne lessee (4). And if the sub-lessee purchase the

(1) *Laybourn v. Gridley*, 61 L. J. Ch. 352.

(2) *Williams v. Pott*, L. R. 12 Eq. 149.

(3) *Drew v. Earl of Norbury*, 3 Jo. & Lat. 267. See also *Doe d. Newman v. Godsill*, 4 Q. B. 603n.; 5 Jur. 170.

(4) *Hayes v. Woodley*, 3 Ir. Ch. R. 142. See *Twiss v. Nettell*, 4 Ir. Eq. R. 80.

reversion in fee, so that the rent reserved on the under lease is due from him to the mesne lessee and the head rent is due from the mesne lessee to him, then, if such purchaser neither makes any payment of the rent due in respect of the under lease, nor applies to the mesne lessee for the head rent, the statute will not, in these circumstances, run against the title of the latter to the original lease (1).

According to the wording of this section it is not necessary, in order to bar the rightful claimant, that the rent reserved should be received by another for a period of twelve years; it is sufficient to bar the title of the rightful owner that the rent should have been once received by a wrongful claimant, and never paid for the next twelve years to the person rightfully entitled. But if a wrongful claimant receives rent for a period less than twelve years and then ceases to receive the rent and makes no claim to receive it, the case is very similar to that in which a person without title has had possession of land for less than the statutory period and has then abandoned possession and left the house unoccupied; in which case it has been held that the title of the owner revives as if he had not been out of possession (2). On the words, "and no payment shall afterwards have been made to the person rightfully entitled," the following question may at some time arise:—Where a wrongful claimant has received rent for more than twelve years, and rent has been subsequently paid to the person rightfully entitled, will the case be excepted from the operation of the statute? It is submitted that it would not, because the title of the person formerly rightfully entitled would have been extinguished by the operation of the 34th section, and a subsequent payment of rent to that person could not revive the title (3).

(1) *Hayes v. Woodley, ubi supra.*

(2) *Agency Co. v. Short*, 13 App. Cas. 793. See *ante*, pp. 289, 310.

(3) But see *Bunting v. Sargent*, 13 Ch. D. 330, *ante*, p. 362.

CHAPTER XI.

ENTRY AND CONTINUAL CLAIM (3 & 4 WM. IV. C. 27,
SS. 10 & 11).PART V.
CH. XI.
—

THE 10th and 11th sections of 3 & 4 Wm. IV. c. 27 prevent the right of a claimant to land being kept alive by a formal entry or claim made on or near the property.

These sections are as follows :—

Sect. 10. “No person shall be deemed to have been in possession of any land within the meaning of this Act merely by reason of having made an entry thereon.”

Sect. 11. “No continual or other claim upon or near any land shall preserve any right of making an entry or distress or of bringing an action.”

Law before
the statute.

Before the passing of the statute 3 & 4 Wm. IV. c. 27, when another person who had no right had taken possession of lands or tenements, the party entitled might make a formal entry thereon, declaring that he thereby took possession, which notorious act of ownership was equivalent to a feudal investiture by the lord. If the claimant were deterred from entering by menaces or bodily fear, he might make claim as near to the land as he could with the like forms and solemnities, which claim was in force for only a year and a day. And this claim, if it were repeated once in every period of a year and a day (which was called a continual claim), had the same effect as a legal entry. Such an entry gave a man seisin or put into possession the person who had the right of entry on the estate, and thereby made him complete owner and

capable of transmitting it either by descent or by purchase (1).

PART V.
CH. XI.

The owner of the estate could only recover seisin by entry, where the original entry of the wrong-doer was unlawful. In other cases, where the original entry was lawful, as upon a discontinuance or deforcement, or where the wrongful occupant came into the estate of the original disseisor by act of law, as upon a descent cast, since the person who had the possession had also an apparent right of possession, the owner of the estate could not enter, but was driven to his action, that is, his real action in which the inheritance or, at least, the freehold, was the thing immediately in demand, and which, therefore, must in all cases have been brought against the actual tenant of the freehold. The action of ejectment, on the contrary, was a remedy open to any one entitled to the mere possession of land and was brought simply to recover such possession; therefore the right to bring such an action was involved in the right of entry (2). However, by the old Statute of Limitations (21 Jac. I. c. 16) it was enacted that no entry should be made by any man upon lands unless within twenty years after his right should accrue. And again, by the statute 4 & 5 Anne, c. 16, it was enacted that no entry should be of force to satisfy the said Statute of Limitations, or to avoid a fine levied of lands, unless an action thereon were commenced within one year after and prosecuted with effect. Since the statute of Anne, therefore, an owner of land who had been disseised could keep up his right of entry only by continually repeating his entry or claim at intervals not greater than a year.

The 10th and 11th sections of the Act 3 & 4 Wm. IV. c. 27 have taken away all effect from such entry or claim, so far as the Statute of Limitations is concerned, and the rightful owner of land will now be barred at the end of twelve years from the time when his right to recover

Entry and
continual
claim now
of no effect.

(1) 3 Blackstone Com. III. 10; 1st ed. vol. III. p. 175.

(2) See Burton's Compend. 8th ed. ss. 402, 403, pp. 140, 141.

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—

possession of the land first accrued, notwithstanding he may from time to time during the twelve years have made entry on the land in assertion of his title; and it seems clear that no entry on a trespasser is sufficient to revest the property in the owner and give him a new right, unless such entry amounts to a resumption of possession by the owner, though it is immaterial how short that possession may be (1).

(1) *Doe d. Baker v. Coombes*, 9 C. B. 714; 19 L. J. C. P. 306; *Randall v. Stevens*, 2 E. & B. 641; 23 L. J. Q. B. 68; *Brassington v. Llewellyn*, 27 L. J. Exch. 297, at N. P. 1 F. & F. 27; *Allen v. England*, 3 F. & F. 49; *Thorp v. Facey*, 35 L. J. C. P. 349; *Worssam v. Vandenbrande*, 17 W. R. 53.

CHAPTER XII.

POSSESSION BY ONE JOINT TENANT OR TENANT IN
COMMON AND POSSESSIO FRATRIS (3 & 4 WM. IV.
c. 27, ss. 12 & 13).

BEFORE the passing of the statute 3 & 4 Wm. IV. c. 27, if a person having an undivided share in an estate had possession of the entirety, or if a younger brother entered on and held land to which his elder brother was entitled as heir, difficult questions might arise as to whether this possession was such as the old Statute of Limitations would protect.

PART V.
CH. XII.
—

The occurrence of such questions for the future was prevented by the 12th and 13th sections of the Act 3 & 4 Wm. IV. c. 27, which are as follows:—

“When any one or more of several persons entitled to any land or rent as coparceners, joint tenants or tenants in common shall have been in possession or receipt of the entirety or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent for his or their own benefit or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them.”

Sect. 12.

“When a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land or to the receipt of any rent shall enter into the possession or receipt thereof, such possession

Sect. 13.

PART V.
CH. XII.Law before
the statute.

or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir."

Under the old law the fact of a joint tenant or tenant in common or coparcener taking all the profits of the land without accounting to his companion, did not of itself constitute such an adverse possession as would by lapse of time make the claims of the latter unavailable. For the possession of a joint tenant, tenant in common, or coparcener *eo nomine* as such was not adverse to the right of his co-tenant, but was in support of the common title (1).

To make such possession adverse to the right of a partner in title, there must have been a disseisin or ouster of the latter from the enjoyment of the property or some dealings from which an exclusion could be presumed (2).

It would seem that a feoffment of the whole land to the use of a stranger by one tenant in common or coparcener was through the violent operation attributed to that mode of conveyance sufficient to work a disseisin (3); but generally, whether an ouster was established or not, was a question to be left to the jury on the circumstances of each case; and on the one hand the mere fact of long enjoyment of the whole property by one tenant in common was held sufficient to justify a jury in presuming an ouster, while on the other hand, where A., a tenant in common, was in possession of land and B., another tenant in common, brought ejectment against him, the fact of A.'s appearing as defendant to the action and entering into a consent rule according to the old practice (4) was held not to be conclusive proof of A.'s possession being adverse to the right of B. (5).

(1) Burton, Compend. s. 395, 8th ed. p. 138; *Doe d. Fishar v. Prosser*, 1 Cowp. 217; *Doe d. Hellings v. Bird*, 11 East, 49.

(2) *Ib.*

(3) Burton, Compend. s. 398, 8th ed. p. 139. Co. Lit. 174a.

(4) See Cole on Ejectment, Part I. Ch. I.

(5) *O'Sullivan, Lessee of, v. McSwiney*, Longfield & T. 111.

The state of the law on this subject before the passing of the statute 3 & 4 Wm. IV. c. 27 and the alteration therein effected by it will be found explained in the judgment of the Court of Error in *Culley v. Doe d. Taylerson* (1).

In that case the defendant in the court below and the lessor of the plaintiff were entitled as tenants in common; the ejectment was brought about three years after the passing of the Act, and the defendant in the action (the plaintiff in error) had had the entire enjoyment of the property claimed for thirty years. The jury were not asked and did not find whether his possession had been adverse to the lessor of the plaintiff. It was held that apart from the statute the possession of the one tenant in common was *primâ facie* the possession of the other, so that the one who had been out of actual possession could not maintain ejectment against the other, nor could he who had enjoyed the property for thirty years claim the whole under the old Statute of Limitations; that the jury might, from long independent enjoyment by one tenant in common or from other circumstances, infer an ouster of the other, but unless they found such ouster it could not be assumed by the Court; that the 12th section of 3 & 4 Wm. IV. c. 27 had a retrospective effect so far as related to the object of the Act, and had the effect of making the possession of coparceners, joint tenants, or tenants in common, separate from the time when they first became such; so that without an actual ouster the one tenant in common could bring his ejectment and the other could defend his possession under the statute; that in the circumstances the possession of the defendant was not adverse to his co-tenant at the time of the passing of the Act, and therefore by the 15th section the lessor of the plaintiff had five years after the passing of the Act to bring his ejectment (2).

PART V.
CH. XII.

Change
made by
3 & 4
Wm. IV.
c. 27.

Culley v.
Doe d.
Taylerson.

(1) 11 A. & E. 1008.

(2) See *Doe d. Holt v. Horrocks*, 1 C. & K. 566.

PART V.
CH. XII.Exclusive
possession
of part of
land

The provision in this section protecting the possession by one of two or more persons entitled in undivided shares to any land applies whether such person is in exclusive possession of the whole of such land or of any part of such land (1), whatever proportion such part may bear to the whole, whether more or less than the proportion which his undivided share bears to the entirety, so that by the possession of such person the title of his companions to their undivided shares in such part will be extinguished. This was decided in England by the Court of Exchequer in *Tidball v. James* (2) and again in Ireland in *Murphy v. Murphy* (3). In the latter case Monahan, C.J., explains from a communication from Martin, B., the case of *Tidball v. James*, which is inaccurately reported, and as reported is difficult to understand.

Receipt of
rents.

If one joint tenant or tenant in common receives the entirety of the rents of the property without accounting to his partner in title, the statute will run in favour of the person so receiving the rents, such rents being possession or receipt of profits within the meaning of the 12th section of 3 & 4 Wm. IV. c. 27 (4).

After the statutory period has run out during which one joint tenant or tenant in common has had exclusive possession or receipt of rents of the entirety, a subsequent payment of rent by the partner in possession to the other joint tenant or tenant in common cannot defeat the title which has been acquired (5).

Possessio
fratris.

Before the statute 3 & 4 Wm. IV. c. 27, where a person died seised in fee, leaving two sons, and the younger son entered, it was considered that he did not enter to

(1) *In re Dane's Estate*, 5 Ir. R. Eq. 498.

(2) 29 L. J. Exch. 91.

(3) 15 Ir. C. L. R. 205.

(4) *Sanders v. Sanders*, 19 Ch. D. 373; *Burroughs v. McCreight*, 1 J. & Lat. 290. *In re Hobbs*. *Hobbs v. Wade*, 36 Ch. D. 553. See *Bolling v. Hobday*, 31 W. R. 9.

(5) *In re Hobbs*. *Hobbs v. Wade*, 36 Ch. D. 553.

get a possession distinct from that of the elder brother, but to preserve the possession of the father in the family that nobody else might abate. For this was the most charitable interpretation that could be put upon such an action, and, as by such an interpretation it was just and rightful, the law would not intend it to be a wrongful act or disseisin, and in consequence the possession of the younger brother became that of the elder. No laches could be imputed to the elder brother in not enforcing his rights, since the younger brother entered and possessed for him. But if the younger brother had made a feoffment in fee, or if the elder brother had entered and then the younger brother had entered upon him, this would have been a destruction of the elder brother's right of possession and the creation of a possession distinct therefrom (1).

So if a sister entered and occupied land to which her brother was entitled as heir, her possession was construed to be by courtesy and licence to preserve the possession of her brother, and therefore not within the intent of the statute 21 Jac. I. c. 16. But, if the brother had ever been in actual possession and had been ousted by his sister, this presumption ceased (2).

The 13th section obviously does away with the whole of these doctrines.

The effect of the entry of a father upon the land of an infant child is governed by entirely different principles, and is discussed hereafter (3).

(1) Gilbert's Tenures, 28, 29; Co. Lit. 242a.

(2) See *Page v. Selfby*, Bull. N. P. 102b.

(3) Part V. Ch. XV.

CHAPTER XIII.

ACKNOWLEDGMENT OF TITLE (3 & 4 WM. IV. C. 27,
s. 14).PART V.
CH. XIII.
—

By sect. 14 of 3 & 4 Wm. IV. c. 27, it is enacted as follows:—

3 & 4
Wm. IV.
c. 27, s. 14.

“ Provided always that when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent, in writing, signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person or any person claiming through him to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued at and not before the time at which such acknowledgment or the last of such acknowledgment, if more than one, was given.”

Effect of
acknow-
ledgment.

The operation of this section is, in effect, to make an acknowledgment in writing tantamount to possession or receipt of rent, at the moment when the acknowledgment is given, by the person to whom or to whose agent the acknowledgment is given, such person being supposed for the purposes of this Act to be simultaneously dispossessed or to have discontinued the receipt. And it

seems clear that such an acknowledgment is of no effect after the prescribed period has run out, because the title, by means of the 34th section, then becomes extinguished, and this section can have no operation in reviving it (1). From some observations (2) of Lord St. Leonards, it would seem to be the opinion of his Lordship that the effect of giving an acknowledgment within the section is immediately to set the time running against the person to whom it is given, even though it had not begun to run before the acknowledgment was made. It is, however, conceived that there is nothing in the words of the section to compel such a construction, which Lord St. Leonards himself characterises as singular and which is contrary to the analogy of all similar provisions, whether in this statute or in 3 & 4 Wm. IV. c. 42. It is submitted that this section, being a proviso on what has gone before, only applies to cases which would come within the earlier sections, and that where it is said that when an acknowledgment shall have been given, the right of action shall be deemed to have then first accrued, the natural construction is not that *whenever* an acknowledgment is given the right of action must be deemed to have accrued, but that whenever the right would under other sections have been deemed to have previously accrued, and an acknowledgment is made, the right shall be deemed to have accrued at the time the acknowledgment is made and not before.

No acknowledgment can have any operation, unless it be in writing, though of course parol evidence of a written acknowledgment would be admissible where, under the ordinary rules of evidence, the contents of a writing could be proved by parol (3); and where the statute runs from the last payment of rent, this section does

(1) *Sanders v. Sanders*, 19 Ch. D. 373.

(2) *Scott v. Nixon*, 3 Dru. & War. 388, 404. See also *Burroughs v. McCreight*, 1 Jo. & Lat. 290, 304.

(3) See *Haydon v. Williams*, 7 Bing. 163.

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—

not prevent the fact of payment being proved by the parol declaration of the person paying it (1). The acknowledgment, it must be observed, is required to be signed by the person giving it, and therefore signature by an agent is insufficient (2). But, if a person signs the name of the principal by his direction in his presence, it is sufficient, for the person signing must, it seems, be looked on not as the agent but as it were the hand or instrument of the principal himself (3).

To whom
given.

The acknowledgment must be made either to the person entitled or his agent. It is clear, therefore, that, unlike an acknowledgment under 3 & 4 Wm. IV. c. 42, s. 5, an admission to third parties would not be an acknowledgment within this section. But an acknowledgment contained in an answer in Chancery in a suit, *in which the person entitled was plaintiff*, has been held to be a good acknowledgment under the section (4). And in an action for use and occupation by an executor, a letter written by the defendant to the testator's attorney after the testator's death was admitted as an acknowledgment of the testator's title (5). This section specially makes acknowledgments enure for the benefit of persons claiming under those to whom they are made, but it is clear that an acknowledgment made by a person in possession is binding on those claiming through him (4). It is a question for the judge and not for the jury to decide whether documents are sufficient acknowledgments within this section. Where, however, the meaning of any writing in itself ambiguous depends on extrinsic facts and circumstances, the whole must be submitted to the jury. But it is for the Court to decide whether a writing is such that it can be an admission of title, and therefore

(1) *Doe d. Spencer v. Beckett*, 4 Q. B. 601.

(2) *Ley v. Peter*, 3 H. & N. 101; 27 L. J. Exch. 239.

(3) *Lessee of Corporation of Dublin v. Judge*, 11 Ir. L. R. 8.

(4) *Goode v. Job*, 28 L. J. Q. B. 1.

(5) *Fursdon v. Clogg*, 10 M. & W. 572.

evidence to go to the jury at all (1). And the Court will look at a letter in answer to which the letter containing the acknowledgment relied on is written for the purpose of explaining the latter (2). This is also in accordance with general principles, and the point has been noticed above as to acknowledgments of simple contract debts (3) upon which several of the cases have arisen (4), but they equally apply to acknowledgments under this section (5). Lord St. Leonards certainly in one case seems to have considered it for the jury to decide whether the writing amounts to an acknowledgment (6), but in his treatise on the Property Statutes (7) he lays down the law as above, and the case referred to cannot therefore be considered as throwing doubt upon it.

It does not seem that any particular form of acknowledgment is necessary, but anything from which an admission of ownership in the party to whom it is given may be fairly implied would be sufficient; thus a correspondence from which it appeared that the person in possession claimed to hold the property till certain accounts as to charges thereon, to which he claimed to be entitled, were settled, and offering to refer them to arbitration, has been held sufficient (8). And even a letter written by the person in possession in answer to one demanding rent, written by the attorney of the person entitled, the first-mentioned letter not denying the title of the person entitled but begging mercy on account of expenses the writer had been put to in defending his title against adverse claimants, has been

What
acknow-
ledgment
is sufficient.

(1) See *Morrell v. Frith*, 3 M. & W. 402.

(2) *Fursdon v. Clogg*, 10 M. & W. 572.

(3) See Part I. Ch. IV. p. 98.

(4) See *Routledge v. Kamsay*, 8 A. & E. 221; *Morrell v. Frith*, 3 M. & W. 402; *Collis v. Stack*, 1 H. & N. 605.

(5) *Doe d. Curzon v. Edmonds*, 6 M. & W. 295.

(6) *Incorporated Society v. Richards*, 1 Dru. & War. 258, 290.

(7) Page 67.

(8) *Incorporated Society v. Richards*, 1 Dru. & War. 258.

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held good as an acknowledgment (1). So also has an admission that the person making the acknowledgment was holding the property as tenant of the person entitled (2), or an offer to take a lease, though such offer was not accepted (3). But where, in answer to a communication from a person claiming the property, demanding rent and offering a lease, the person in possession after expressing an opinion that he could establish his right if it were tried, said that under all the circumstances he had made up his mind to accede to the proposal, but the proposal was never carried out and no lease was executed or any rent paid, this was held to be no acknowledgment, as there was no final bargain (4); and this was clearly right, as the correspondence in fact amounted merely to negotiations for a compromise which went off. A covenant to pay a mortgage debt, contained in a deed which for this purpose must be considered as executed subsequently to and referring to the mortgage, has been held in ejectment by the mortgagee to be an acknowledgment of the existence of the relations of mortgagor and mortgagee, and therefore an acknowledgment of the mortgagee's title (5). In the case referred to the mortgage was of copyhold, and the mortgagee was admitted on the 27th October, 1827, upon a surrender made the same day, and there was this peculiarity, that a deed was produced expressed to bear date also on that day between the mortgagor and mortgagee, reciting that the surrender was made by way of mortgage and containing a proviso for redemption in the form of a covenant to resurrender by the mortgagee and a covenant for payment by the mortgagor; it was proved, however, that this deed was in fact executed on the 23rd August, 1834;

(1) *Fursdon v. Clogg*, 10 M. & W. 572.

(2) *Goode v. Job*, 28 L. J. Q. B. 1.

(3) *Lessee of Corporation of Dublin v. Judge*, 11 Ir. L. R. 8.

(4) *Doe d. Curzon v. Edmonds*, 6 M. & W. 295.

(5) *Jayne v. Hughes*, 10 Exch. 430.

and it was held in ejectment brought on the 9th February, 1854, that, although no interest had been paid, the action was in time, as the acknowledgment was made on the 23rd August, 1834, the day on which the deed was actually executed. In the Irish case of *Hobson v. Burns* (1) the lessor of the plaintiff in ejectment brought in 1848, produced as an acknowledgment an insolvent's schedule signed by the defendant less than twenty years before action, in which was inserted amongst her liabilities a sum due for costs in an action of ejectment in 1824, in which she had been defeated, and for damages subsequently obtained in an action for mesne profits; possession, it appeared, had not been given under the judgment in ejectment; and it was held, irrespective of all other reasons, that there was no acknowledgment within the statute, for if the schedule was an acknowledgment of title at all, it was only an acknowledgment at the time it was signed of a title existing at an antecedent period in one through whom the defendant claimed, and was quite consistent with the non-existence of such title at the time the acknowledgment was made. If, however, the acknowledgment relied on is made within the twelve years and admits that there existed prior to the acknowledgment but also within the twelve years a title in the person whose right is in question or in those through whom he claims, it may well be argued that such acknowledgment would be sufficient, and it would probably be held so, though it is believed that there is no case on the point. It may be observed with reference to the case of *Hobson v. Burns* (1) that an admission that a person has recovered in ejectment would not appear to be an admission of title at all, for such an admission is quite consistent with an assertion that the judgment in ejectment was wrong, and that such person had no title at all. Another point was raised in the case of *Hobson v. Burns* (1) and was not decided,

(1) 13 Ir. L. R. 286.

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Admission
in insol-
vent's
schedule
and bank-
rupt's
balance
sheet.

*Lewis v.
Thomas.*

namely, whether an admission of title in an insolvent's schedule could be an acknowledgment within this section. This question has been sufficiently considered above, as the observations on this point and also on the effect of an admission in a bankrupt's balance sheet, made in a former chapter (1), with regard to acknowledgments under the 40th section, would seem applicable to acknowledgments under this section.

With reference to this section the case of *Lewis v. Thomas* (2) should be mentioned. The bill in that suit was filed in September, 1840, by the heir of Alice Thomas against the devisees of Mary Davies, with whom Alice Thomas had lived since 1811. Alice Thomas died in 1828, having been of unsound mind since 1798, and it appeared that she had in 1815 become entitled to the property in question, as heiress of the husband of Mary Davies, but from that time Mary Davies or her devisees had received the rents and profits, Alice Thomas never having received any, except so far as Mary Davies may have applied them for her benefit. The suit was brought to set aside, on the ground of insanity and of fraud, a will and other instruments executed in 1818 and 1827 by Alice Thomas, the effect of which was to assure or devise the property to Mary Davies. Issues were directed by the Master of the Rolls, and the jury found that there was no devise, and found fraud as to the other instruments. The case came on for hearing before Wigram, V.-C.; he, in giving judgment, remarked that a defence founded on the statute having been insisted on by the answer, the Court by directing the issues must be taken as having decided that such defence failed, and he did not think any question on the statute then open to him; but he then proceeded to say:—"Looking at the case on the merits, I have not the slightest doubt of the justice of the decision which determined that Mary Davies did not

(1) Part III. Ch. V. p. 224.

(2) 3 Hare, 26.

acquire an adverse title to any part of this property ; nor have I any doubt that I should have come to the same conclusion if the question had been now open for my decision. It would have been greatly to be lamented if the law had permitted Mary Davies under such circumstances to have acquired a title to the property. She has herself, as appears by the instruments in question in the suit, put her title upon those instruments. Those deeds are conclusive evidence that she did not claim against, but on the contrary that she claimed under Alice Thomas ; they are *direct acknowledgements of the title of Alice Thomas* ; it is not a case of adverse possession. I do not know whether the Master of the Rolls had under his consideration the question whether the case was or was not one of concealed fraud within the meaning of the statute, but I think I should have had no difficulty in concluding that such was the case." This is not the place to consider the question of fraud or the effect of the statute as a bar to the setting aside of void or voidable deeds, or the use of the expression "adverse possession," but, so far as the question of acknowledgment is concerned, it is submitted that if the Vice-Chancellor meant to say that the instruments referred to amounted to acknowledgments within the 14th section so as to prevent the operation of the statute, he was mistaken, for, except with respect to part of the copyhold, the only instruments were a power of attorney signed by Alice Thomas, a surrender in pursuance thereof and a will. Now none of these could have been acknowledgments by Mary Davies because not signed by her, and as to the other part of the copyhold, although there was a deed, it does not appear to have been executed by Mary Davies, although she was a party to it. On the whole, the decision may perhaps be more safely supported on the other grounds suggested in the case.

CHAPTER XIV.

POSSESSION NOT ADVERSE AT THE PASSING OF THE ACT
(3 & 4 WM. IV. C. 27, S. 15).PART V.
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It has been pointed out that time did not run under the old Statutes of Limitations unless the possession was strictly adverse to the title of the rightful owner. The former sections of the statute being generally retrospective and operating against the title of an owner out of possession, whether the possession of the party holding the land may have been adverse or not, might, if they stood alone, have barred the title of an owner of land the moment the Act passed, though till then time had not begun to run against him. To prevent this hardship arising a period of five years for owners to bring their action in such cases was allowed by the 15th section, which provides as follows:—

3 & 4
Wm. IV.
c. 27, s. 15.

“When no such acknowledgement as aforesaid shall have been given before the passing of this Act, and the possession or receipt of the profits of the land or the receipt of the rent shall not at the time of the passing of this Act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years, hereinbefore limited shall have expired, make an entry or distress or bring an action to recover such land, or *interest* [*sic*], at any time within five years next after the passing of this Act.”

This section is now of little practical importance, the

period of five years mentioned in it having so long ago elapsed.

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The section contains no saving in case of disability, and therefore if the rightful claimant were under a disability at the time of the passing of the Act he would not have a period of five years given by this section to institute proceedings from the time the disability ceased (1).

Neither is the effect of this section to give every person who had a right at the time of the passing of the Act a period of five years for the assertion of that right. It applies only to those cases in which there was no adverse possession at the time of the passing of the Act. That does not mean an adverse possession for twenty years; an adverse possession for any period, however short, before the passing of the Act would be sufficient to oust a person from the benefit of this section (2).

The question whether at the time of the passing of the Act there was such an adverse possession as would bring a person within the 15th section, had to be determined as it would have been if the Act had never passed (3).

The word "interest" in the last clause of this section is found in the Parliament roll and appears to be a mistake for "rent" (4).

(1) *Scott v. Nixon*, 3 Dru. & War. 388, 405.

(2) Judgment of Pennefather, B., in *O'Sullivan v. McSweeney*, 2 Ir. L. R. 89, 94.

(3) *Doe v. Williams*, 5 A. & E. 291, 296; *Culley v. Doe d. Taylerson*, 11 A. & E. 1008, 1025.

(4) *Per* Lord Denman, C.J., *Doe d. Angell v. Angell*, 9 Q. B. 360.

CHAPTER XV.

DISABILITIES (3 & 4 WM. IV. c. 27, s. 18; 37 & 38 VICT. c. 57, ss. 3, 4 & 5).

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BEFORE the coming into operation of 37 & 38 Vict. c. 57 the absence beyond the seas of a person to whom a right to land accrued was a disability which prevented the Statute of Limitations running against his claim. This ground of disability no longer exists, and time runs against the title of a person who is abroad at the time when a right to land accrues to him as if he were in the United Kingdom.

The provisions relating to disabilities are now contained in the 3rd, 4th and 5th sections of 37 & 38 Vict. c. 57 and in the 18th section of 3 & 4 Wm. IV. c. 27 as altered by the 9th section of 37 & 38 Vict. c. 57. These sections are as follows:—

3rd section
of 37 & 38
Vict. c. 57.

“If at the time at which the right of any person to make an entry or distress, or to bring an action or suit to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned, (that is to say) infancy, coverture, idiotcy, lunacy, or unsoundness of mind, then such person, or the person claiming through him, may, notwithstanding the period of twelve years, or six years, (as the case may be) hereinbefore limited shall have expired, make an entry or distress, or bring an action or suit, to recover such land or rent, at any time within six years next after the time at which the person to whom such right shall first have accrued shall have ceased to be under any such disability, or shall have

died (whichever of those two events shall have first happened)."

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"The time within which any such entry may be made, or any such action or suit may be brought as aforesaid, shall not in any case after the commencement of this Act be extended or enlarged by reason of the absence beyond seas during all or any part of that time of the person having the right to make such entry, or to bring such action or suit, or of any person through whom he claims."

4th section
of 37 & 38
Vict. c. 57.

"No entry, distress, action, or suit shall be made or brought by any person who at the time at which his right to make any entry or distress or to bring an action or suit to recover any land or rent shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within thirty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such thirty years, or although the term of six years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired."

5th section
of 37 & 38
Vict. c. 57

"Provided always that when any person shall be under any of the disabilities hereinbefore mentioned at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent beyond the said period of *twelve* years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent, shall have first accrued, or the said period of *six* years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person."

18th section of 3 & 4 Wm. IV. c. 27 as altered by s. 9 of 37 & 38 Vict. c. 57.

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—
Coverture.

It has been held (1) that a woman married before the 1st January, 1883, became “discovert” within the meaning of the statute of James on that date, which was the time when the Married Women’s Property Act, 1882 (2), came into operation, sect. 1, sub-sect. 2 of that Act enabling a married woman to sue either in contract or tort as a *feme sole*. The 12th section of the Married Women’s Property Act, 1882, provides that a married woman shall have the same civil remedies for the protection and security of her own separate property as if such property belonged to her as a *feme sole*. And therefore it may be contended that the Married Women’s Property Act, 1882, has put an end to coverture as a disability under the 3rd section of 37 & 38 Vict. c. 57, so far as regards the real estate of women married after 1st January, 1883, and so far as regards real estate of women married before that date, the title to which accrued after that date (3). The Married Women’s Property Act, 1882, does not affect the interests of a husband and wife in the wife’s property when the marriage took place or the wife’s title to the property accrued before 1st January, 1883. In such cases coverture must still be a disability within the 3rd section of 37 & 38 Vict. c. 57.

It will be seen that the provisions of sect. 3 of 37 & 38 Vict. c. 57, which is substituted for the 16th section of 3 & 4 Wm. IV. c. 27, are different from the provisions for disabilities in the enactments before discussed. In those the same time is given after the termination of the disability as from the accrual of the cause of action. By the 16th section of 3 & 4 Wm. IV. c. 27, following the 2nd section of 21 Jac. I. c. 16, relating to real actions and rights of entry, a period of ten years was given from the death of the person under disability or the cessation of the

(1) *Lowe v. Fox*, 15 Q. B. D. 667. See above, Part I. Ch. III. p. 56.

(2) 45 & 46 Vict. c. 75.

(3) See Married Women’s Property Act, 1882, s. 5.

disability, whichever should first happen. And this provision was held to apply, though the person under disability died before the Act passed (1). By the 3rd section of 37 & 38 Vict. c. 57 the period of six years was substituted for ten. Under these enactments there is no question, as we have seen there was with reference to actions within the 3rd section of the statute of James, as to the effect of the death of the party under disability; it is clear that the six years begins to run from such death, and the 18th section of 3 & 4 Wm. IV. c. 27 prevents any question as to a further time being allowed for the disability of any person claiming through one to whom the right accrued, and who died under disability (1).

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We shall see (2) that under sect. 22 of 3 & 4 Wm. IV. c. 27, if time has begun to run against a tenant in tail, the remainderman is barred at the same time as the tenant in tail would have been barred, had he lived (3). No allowance is made for the disability of such remainderman at the time when his remainder falls into possession.

Remainder-
men in tail.

If a person entitled to land is under any disability at the time when his right accrues, and, before that disability ceases, another supervenes, time will not run against such person until the last of such disabilities is removed (4). But when time has once begun to run, it will not be stopped by the occurring of a subsequent disability (5).

Successive
disabilities.

Where a father is in possession of an estate belonging to an infant child, he will, in ordinary circumstances, be presumed to have entered on it as the guardian or bailiff of the infant, and such possession during the infancy is

Possession
of infant's
property.

- (1) *Devine v. Holloway*, 14 Moore, P. C. C. 290.
- (2) Part V. Ch. XVI. p. 405.
- (3) *Goodall v. Skerratt*, 3 Drew, 216.
- (4) *Borrows v. Ellison*, L. R. 6 Exch. 128; 40 L. J. Exch. 131.
- See 1 Hayes *Couveyancing*, p. 240, and above, Part I. Ch. III. p. 61.
- In re Dane's Estate*, 5 Ir. R. Eq. 498.
- (5) *Murray v. Watkins*, 62 L. T. 796.

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one on which the statute will not operate (1), and the entry on and possession of an infant's estate by others than the father may make the same rule applicable to such entry and possession (2). And where the person so held to be guardian or bailiff continues in possession after the infancy has ceased, he is supposed to continue in possession in the same character as before, unless something is done to change the character of the possession, and the statute will not run even after the infancy has ceased until the character of the possession is changed (3).

When the right is deemed to accrue under these sections.

There are, as has been before pointed out, some cases in which the right to bring an action, &c., must be considered as having accrued for the purposes of the Acts 3 & 4 Wm. IV. c. 27 and 37 & 38 Vict. c. 57 before any such right has in fact accrued at all; the consequence of this is in some cases to make the provision for disabilities practically nugatory. This is perhaps best stated in the case of *Owen v. De Beauvoir*, by Parke, B. (4), in which case this result of the interpretation which was put there on the 3rd section of 3 & 4 Wm. IV. c. 27 was pointed out and unsuccessfully made use of as an argument against such interpretation. That case decided that, with reference to quit rents (5), the right accrues for the purposes of the Act, and time therefore begins to run, not at the time when default is first made in payment, but at the time when the last payment is made. In the course of his judgment, Parke, B., said (6): "The last objection

(1) *Thomas v. Thomas*, 2 K. & J. 79. *In re Hobbs. Hobbs v. Wade*, 36 Ch. D. 553.

(2) *Pelly v. Bascombe*, 4 Giff. 390; see *Nanney v. Williams*, 22 Beav. 452; *Howard v. Earl of Shrewsbury*, L. R. 17 Eq. 397. See *Lambert v. Browne*, 5 Ir. R. C. L. 218; *Quinton v. Frith*, 2 Ir. R. Eq. 396.

(3) *In re Hobbs. Hobbs v. Wade*, 36 Ch. D. 553; *Wall v. Stanwick*, 34 Ch. D. 763.

(4) 16 M. & W. 547; see above, Part V. Ch. II. p. 280; Ch. III. p. 301.

(5) See *ante*, Part V. Ch. II. p. 280.

(6) 16 M. & W. 567.

insisted on was founded on the 16th section, which saves the rights of infants, *femes covert*, lunatics, and other persons under disabilities. The clause, it will be observed, is made to operate only where the party intended to be protected is under disability at the time when the right to make the distress or bring the action first accrued; and if this be held to be the time when the last payment was made, the protection will be, in many cases, wholly illusory. Put the case, for instance, of a party regularly receiving his rent up to a given day, and becoming lunatic before the next day of payment arrives; if he should, by reason of his lunacy, omit to enforce payment of his rent for twenty years, it would seem, on all principle, that he must have been intended to be protected; but, certainly, as he was not under disability at the last time of payment, he would not come within the protection of the 16th section. Many other similar cases may be pointed out. This is, no doubt, a very serious defect, and would afford strong grounds for adopting any reasonable construction of the 3rd section by which it might be remedied. But no construction would have that result; for, even if by a forced and difficult construction of the sixth (? *first*) branch of this section, we were to hold that the point of time there designated was not the last actual payment, but the time when the rent first fell into arrear; yet the very same difficulty would exist in all the other cases pointed out by the statute, namely, the case of a person dying seised and leaving an heir not under disabilities, but who should become disabled before any rent has accrued due, and the case of a person claiming under a settlement, who may be a *feme sole* when her title accrues, but may be under coverture before she has any title to distrain or sue for rent; and so as to the other cases provided for by the 3rd section. The same thing may be said of the 8th section. For these reasons, though we are fully sensible of the incongruities of the case, yet we feel bound to act

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on the plain and natural construction of the language of the 3rd section, and to hold that the right of the defendant in this case to distrain must be taken to have first accrued on the 15th day of January, 1825, when the last payment was made, and so that the distress made in May, 1845, was unlawful, all right to the rent having been extinguished before that time."

The same point was afterwards pressed in argument in the same case in error (1), and on this, Patteson, J., in delivering the judgment of the Court, makes the following observations (2): "The inconvenience of a person coming under disability after the receipt of rent and before the right of action, &c., accrued, was strongly pressed, and is indeed more substantial; but it is to be observed that the legislature in passing this Act has in a much more important instance left the rights of persons under disability unprotected, inasmuch as sect. 42, which bars the recovery of arrears after six years, has no proviso in favour of such persons. The circumstance therefore of their not being perfectly protected by the 16th section does not afford a ground for presuming against a construction which involves that consequence."

The case of *Owen v. De Beauvoir* in the court below was heard before Parke, Rolfe, and Alderson, BB., and in error before Patteson, Coleridge, Coltman, Maule, Cresswell, Erle, Wightman, and Williams, JJ., so that these eleven judges seem to have been unanimously of opinion that in the 16th section of 3 & 4 Wm. IV. c. 27 (now the 3rd section of 37 & 38 Vict. c. 57) the words "the time at which the right of any person to make an entry, &c., shall have first accrued as aforesaid," mean not the time at which the right has actually accrued, but the time at which by the 3rd and following sections of 3 & 4 Wm. IV. c. 27 the right shall be deemed to have accrued, whether any right shall have actually accrued

(1) 5 Exch. 166.

(2) *Ib.* p. 182.

or not, even though by this construction the rights of persons under disability may in such cases be virtually unprotected. Lord St. Leonards, in his treatise on the Property Statutes (1), seems to think that this construction is wrong, and that the time at which the right &c., shall have first accrued in the 16th section of 3 & 4 Wm. IV. c. 27 (now the 3rd section of 37 & 38 Vict. c. 57) may even, with reference to cases which fall within the 3rd section of 3 & 4 Wm. IV. c. 27, be construed as if the 2nd section stood alone and the 3rd were not in the Act. This reasoning would of course equally apply where, by the operation of any other of the sections, the time at which the right shall be deemed to have accrued is different from that at which it actually accrues, or would be thought to accrue for any purpose if the 2nd section of 3 & 4 Wm. IV. c. 27 (now the 1st section of 37 & 38 Vict. c. 57) stood alone. The case of *Owen v. De Beauvoir* (2), as Lord St. Leonards observes, turned on the construction of the 3rd section of 3 & 4 Wm. IV. c. 27, and not of the 16th; but, after the unanimous expression of opinion in the Court of Exchequer and the Exchequer Chamber, the point would probably be treated in any court below the House of Lords as concluded by authority; and considering the words with which the 3rd section of 3 & 4 Wm. IV. c. 27 is introduced, namely, “*in the construction of this Act*, the right, &c., shall have first accrued,” and that the 16th section of 3 & 4 Wm. IV. c. 27 speaks of the time at which “the right, &c., shall have first accrued *as aforesaid*,” it seems almost necessary to hold that the time referred to in the 16th section of 3 & 4 Wm. IV. c. 27 (and now in the 3rd section of 37 & 38 Vict. c. 57) means as to cases falling within the 3rd section of 3 & 4 Wm. IV. c. 27, or the 2nd section of 37 & 38 Vict. c. 57, the time as defined by those sections and by the 4th section of 3 & 4 Wm. IV.

(1) Page 71, *et seq.*

(2) 16 M. & W. 547; 5 Exch. 166.

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c. 27. Although the words "in the construction of this Act" are not repeated in the 6th, 7th, and 8th sections of 3 & 4 Wm. IV. c. 27, still it would seem that all those sections must be treated in the same way, and that in those cases to which they apply the time therein specified is to be taken as the time at which the right accrues not only in the construction of the 2nd section of 3 & 4 Wm. IV. c. 27 (now the 1st section of 37 & 38 Vict. c. 57), but in the construction of the 16th section and every other section of 3 & 4 Wm. IV. c. 27; and, as the Act 3 & 4 Wm. IV. c. 27 is to be construed as one Act with the amending Act 37 & 38 Vict. c. 57 (1), the sections of 37 & 38 Vict. c. 57 must be treated in the same way. The 2nd section of 3 & 4 Wm. IV. c. 27 (now the 1st section of 37 & 38 Vict. c. 57) must itself in all cases which fall within the 3rd section of 3 & 4 Wm. IV. c. 27 and other defining sections of the Act be read by the light of these sections, or they would have no force whatever. This, it is submitted, is the answer to Lord St. Leonards' question (2), "Why should not this (*i.e.* the 16th section of 3 & 4 Wm. IV. c. 27) refer, as it was no doubt intended to do, to what it expresses, the time when his right to enter, &c. first accrued, or in other words to the 2nd section (*i.e.* of 3 & 4 Wm. IV. c. 27), instead of to a period when he had no such right, which is arbitrarily appointed by the 3rd section for a distinct object?"

By the 14th section of 3 & 4 Wm. IV. c. 27, when a signed acknowledgment has been given, the right is to be deemed to have first accrued at and not before the time at which such acknowledgment is given; and if the interpretation of the 16th section of 3 & 4 Wm. IV. c. 27 (now the 3rd section of 37 & 38 Vict. c. 57) above contended for is the true one, it would seem to follow that, if the person to whom the acknowledgment is given is then under disability, the savings provided by the 16th

(1) See 37 & 38 Vict. c. 57, s. 9.

(2) Prop. Stat. p. 73.

section of 3 & 4 Wm. IV. c. 27 (now the 3rd section of 37 & 38 Vict. c. 57) will apply. The case of persons being under disability at the time of making an acknowledgment as to specialty debts is, as we have seen, expressly provided for by 3 & 4 Wm. IV. c. 42.

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It will be observed that the allowance of ten (now six) years after the person to whom the right shall have accrued shall have ceased to be under disability or shall have died is given to such person or *to the person claiming through him*, so that if the section be interpreted strictly, it would seem that if a person under disability is dispossessed and then conveys to another (which would only be possible now in cases of coverture not governed by the Married Women's Property Act, 1882), then the period during which the grantee could recover possession would depend upon how long the grantor remained under disability, though *the grantor* is from the time of the conveyance a perfect stranger to the land. This, if the right interpretation, might have a curious operation; for if a trespasser took possession of the land when the owner was a *feme covert*, and such owner immediately afterwards conveyed the land to a person under no disability and remained under coverture for twenty-three years and then died, the grantee would not be barred till the end of twenty-nine years from the time of the conveyance, though he might have brought his action at any time within that period; while on the other hand, if the grantor conveyed the land just before her death or the termination of the coverture, the grantee would only have six years within which to bring his action. On the other hand, it might be contended that a disability may fairly be considered for the purposes of these sections, as existing only with reference to the subject-matter of such disability, namely, the title to the land in question, and that consequently, when the person under disability ceased to have any connection with the title to the land, by conveying it away, the disability

Transfer of
estate dur-
ing dis-
ability.

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may be considered for the purposes of these sections as ceasing to exist.

The effect of the Married Women's Property Act, 1882, is, it would seem, to make these questions of little practical importance ; for if, as is submitted, the effect of that Act is to abolish the disability of coverture as regards real property, except as to women married before the 1st January, 1883, and as regards property, to which any married women have become entitled after that date, and as the disability of absence beyond seas has been abolished by 37 & 38 Vict. c. 57, it is hardly likely that many questions will in future arise as to the effect of a conveyance by a person under disability.

Disability
of one co-
parcener.

It was held in a case that arose under 21 Jac. I. c. 16, that where an estate descended to two co-parceners, one of whom was under a disability which continued more than twenty years and the other did not enter within the twenty years, the disability of the one did not preserve the title of the other after the twenty years had elapsed (1).

(1) *Doe d. Langdon v. Rowlston*, 2 Taunt. 441.

CHAPTER XVI.

ESTATES TAIL (3 & 4 WM. IV. c. 27, ss. 21 & 22,
AND 37 & 38 VICT. c. 57, s. 6).

BEFORE the passing of the Act 3 & 4 Wm. IV. c. 27, the periods within which tenants in tail and remaindermen after estates tail could enforce their rights were regulated by 21 Jac. I. c. 16, s. 1, which enacted as follows :

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“All writs of formedon in descender, formedon in remainder, and formedon in reverter, of any manors, lands, tenements, or other hereditaments whatsoever, at any time hereafter to be sued or brought by occasion or means of any title or cause hereafter happening, shall be sued and taken within twenty years next after the title and cause of action first descended or fallen, and at no time after the said twenty years; and no person or persons that now hath any right or title of entry into any manors, lands, tenements, or hereditaments now held from him or them shall thereinto enter but within twenty years next after the end of this present session of Parliament, or within twenty years next after any other title of entry accrued; and no person or persons shall at any time hereafter make any entry into any lands, tenements, or hereditaments, but within twenty years next after his or their right or title which shall hereafter first descend or accrue to the same; and in default thereof, such persons so not entering, and their heirs shall be utterly excluded and disabled from such entry after to be made; any former law or statute to the contrary notwithstanding.”

21 Jac. I.
c. 16, s. 1.

It seems that the title of the issue in tail first de-

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—

scended or fell within the meaning of this section upon the decease of the last tenant in tail, who had possession in right of his title as such; but when the time once began to run, it ran against all the heirs in tail claiming *per formam doni*, and no persons subsequently claiming under the entail, whether issue of him against whom time first began to run or not, acquired a fresh right (1). And where it was shown that a tenant in tail, who had been dead seven years, had been in possession about thirty-five years before the ejectment brought by his heir in tail, since which time the defendants, or those through whom they claimed, had been in possession, but there was no evidence to account for such possession, which might have been referable to a conveyance by the ancestor which did not discontinue the estate tail, it was held that there was no such presumption in favour of the defendants, arising from the long possession, as to throw on the lessor of the plaintiff the onus of showing that the ancestor in tail had not conveyed by fine and recovery (2).

The statutes 3 & 4 Wm. IV. c. 27 and 37 & 38 Vict. c. 57 contain some important provisions relating to the rights of tenants in tail and remaindermen claiming after the determination of estates tail, and in fact give time the same effect in barring estates tail and remainders over as an assurance competent to bar them. The sections containing these provisions are the 21st and 22nd sections of 3 & 4 Wm. IV. c. 27 and the 6th section of 37 & 38 Vict. c. 57, which re-enacts the 23rd section of 3 & 4 Wm. IV. c. 27, but substitutes twelve for twenty years as the period of limitation. These sections are as follows:—

21st section
of 3 & 4
Wm. IV. c.
27. .

“When the right of a tenant in tail of any land or rent to make an entry or distress or to bring an action to recover the same shall have been barred by reason of

(1) *Tolson v. Kaye*, 3 B. & B. 217.

(2) *Doe d. Smith v. Pike*, 3 B. & Ad. 738.

the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress, or action shall be made or brought by any person claiming any estate, interest or right which such tenant in tail might lawfully have barred."

"When a tenant in tail of any land or rent entitled to recover the same shall have died before the expiration of the period hereinbefore limited, which shall be applicable in such case for making an entry or distress, or bringing an action to recover such land or rent, no person claiming any estate, interest, or right which such tenant in tail might lawfully have barred shall make an entry or distress or bring an action to recover such land or rent, but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action."

22nd section of 3 & 4 Wm. IV. c. 27.

"When a tenant in tail of any land or rent shall have made an assurance thereof which shall not operate to bar the estate or estates to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person or any other person whosoever (other than some person entitled to such possession or receipt in respect of an estate which *shall have taken effect* after or in defeasance of the estate tail) shall continue or be in such possession or receipt for the period of twelve years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then, at the expiration of such period of twelve years, such

6th section of 37 & 38 Vict. c. 57.

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assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest or right to take effect after or in defeasance of such estate tail."

Effect of
21st and
22nd sec-
tions of 3 &
4 Wm. IV.
c. 27.

The 21st section of 3 & 4 Wm. IV. c. 27 applies to cases where the prescribed period has run out against a tenant in tail during his life, and provides in effect that in such a case the right of all persons whom he might have barred by any act of his own shall be barred by the effluxion of time against himself (1). The 22nd section of 3 & 4 Wm. IV. c. 27 applies to cases where the prescribed period has begun to run against a tenant in tail in his lifetime, but where he has died before the completion of the prescribed period; and in such cases the effect, as against all whom he might have barred by an act of his own, is the same as if they, whether issue in tail or remaindermen, had claimed through him as heirs. The object of these sections, so far as issue in tail alone are concerned, at any rate where the tenant in tail is a purchaser, would probably be effected by the interpretation clause of 3 & 4 Wm. IV. c. 27 alone, which enacts that "the person through whom another is said to claim shall mean any person by, through, or under or by the act of whom the person so claiming became entitled to the estate or interest claimed," as (amongst others) "issue in tail" (2). Still these sections clearly affect both issue and remaindermen. The intention and operation of these sections with regard to remaindermen was explained by Kindersley, V.-C., in *Goodall v. Skerratt* (3), where, owing to the failure of the issue in tail during the life of the tenant in tail, the only question was the effect of the sections on the remaindermen. Applying the expressions of the Vice-Chancellor to the issue as well as to the remaindermen, the intention and

(1) See *Austin v. Llewellyn*, 9 Exch. 276; 23 L. J. Exch. 11.

(2) See *Cannon v. Rimington*, 12 C. B. 1, 16; *Murray v. Watkins*, 62 L. T. 796.

(3) 3 Drew, 216.

operation of these sections is to put the issue and remaindermen, whose estates might be barred by the tenant in tail, in the same position as if they claimed under the tenant in tail. That is to say, the conduct of the tenant in tail in allowing the whole or any portion of the twelve years to run without making an entry or bringing an action does, to the extent of the period allowed to elapse, bind the issue in tail and remaindermen as if the tenant in tail had owned the fee simple.

By issue must of course be meant all the issue of the first tenant in tail claiming *per formam doni*, and capable of inheriting under the entail, whether issue of the tenant in tail against whom time has run or begun to run or not. The 21st and 22nd sections of 3 & 4 Wm. IV. c. 27, it must be particularly observed, do not apply to cases where the tenant in tail has, by conveying away his own right, put it out of his power to make an entry or bring an action, but only to those cases where he neglects to make an entry or bring an action (1).

Under the old law, if a tenant in tail executed an innocent conveyance purporting to pass the fee, and died leaving issue in tail surviving, the grantee had a base fee subject to be defeated by the entry of the issue in tail (2); and now that no assurance can have a tortious operation, every conveyance in fee by a tenant in tail, otherwise than by a deed enrolled, would seem to have the same effect. In such a case, therefore, the right of entry or action accrues to the issue in tail upon the death of the tenant in tail who executed such conveyance, and under the 21st and 22nd sections of the statute 3 & 4 Wm. IV. c. 27 time begins to run against them and all remaindermen from the date of such death.

The 6th section of 37 & 38 Vict. c. 57 (which has been substituted for the 23rd section of 3 & 4 Wm. IV. c. 27)

(1) *Cannon v. Rimington*, 12 C. B. 1, 16; *Rimington v. Cannon*, 12 C. B. 18, 34; *Murray v. Watkins*, 62 L. T. 796.

(2) *Woodroffe v. Doe d. Daniel*, 15 M. & W. 769, 793; 2 H. L. 811, 829; *Cannon v. Rimington*, 12 C. B. 12, 17.

Possession
under en-
rolled
grant by
tenant in
tail in
remainder.

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provides for cases where a tenant in tail in remainder has executed an assurance which would have barred all remaindermen, if he had at the time of its execution been tenant in tail in possession. The effect of the section is to bar all the remaindermen at the end of twelve years from the first time at which such tenant in tail or some person claiming under the entail would have been entitled in possession to the same estate tail. This section (like the 23rd section of 3 & 4 Wm. IV. c. 27, for which it has been substituted) only gives effect to assurances which, though ineffectual to bar the remaindermen, are effectual to bar the issue in tail (1). It was decided in a case under 3 & 4 Wm. IV. c. 27, s. 23, that if a tenant in tail in possession conveyed the entailed property by a deed not enrolled and possession was enjoyed under such deed for more than twenty years, the right of the issue would not be barred during the life of the grantor by the 23rd section or any other section: the case is the same as if the tenant in tail had merely granted away his life estate (2). The 23rd section of 3 & 4 Wm. IV. c. 27 has been held to apply to the case of possession under a base fee and not to possession during the life estate of a grantor who is entitled to an estate tail in remainder. Where, therefore, a tenant for life having an estate tail in remainder after other life estates made a conveyance in fee simple, it was held that time did not begin to run under this section until the estate tail fell into possession (3). To bring a case within the operation of the 23rd section of 3 & 4 Wm. IV. c. 27 or the 6th section of 37 & 38 Vict. c. 57, possession must be taken *by virtue of* such assurance. Therefore, if there be tenant for life, remainder in tail, with remainders over, and tenant in tail in remainder convey to a stranger by an assurance competent to bar

(1) See *Penny v. Allen*, 7 De G. M. & G. 409; *Morgan v. Morgan*, L. R. 10 Eq. 99; 39 L. J. Ch. 493.

(2) *Morgan v. Morgan*, L. R. 10 Eq. 99; 39 L. J. Ch. 493.

(3) *Mills v. Capel*, L. R. 20 Eq. 692; 44 L. J. Ch. 674.

his issue, then, if neither the tenant in tail nor any of his issue survive the tenant for life, or if they survive but the grantee does not acquire possession during their life, it would seem that the remaindermen could not be affected by this section, because the assurance only taking effect to bar the issue could give no right to the grantee to enter into possession at a time when the remaindermen were entitled, and the grantee, therefore, if he took possession, could not be said to do so *by virtue of such assurance*. It seems clear, however, that a grantee so taking possession would be a trespasser, and that as between him and all the remaindermen time would run accordingly.

If the tenant in tail or any of his issue survive the tenant for life and the grantee once enter upon the death of the tenant for life, all the remaindermen must, at the expiration of twelve years from such death, in case the issue exist so long, be inevitably barred, and they must also be barred even if the issue fail before that period has elapsed, unless in the meantime possession be obtained by a person claiming in respect of an estate taking effect after or in defeasance of the estate tail.

Possession under the assurance spoken of will not begin to have any effect by virtue of this section till the time arrives at which the tenant in tail who executed that assurance or some person claiming under the entail would have been entitled in possession to the same estate tail (1).

If there has once been possession by a person claiming under such an assurance by a tenant in tail as above spoken of, it is quite immaterial who is subsequently in possession, provided it be not a person claiming in respect of an estate which shall have taken effect in defeasance of the estate tail. If, therefore, a grantee has once taken possession under such an assurance, and time

(1) *Mills v. Capel*, L. R. 20 Eq. 692; 44 L. J. Ch. 674.

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has begun to run, the title of all remaindermen will be extinguished in twelve years, although such grantee be dispossessed by a wrongdoer before the end of that period. When that period has expired, such a wrongdoer is not liable to be ousted by the remaindermen, but it does not follow that he has any title as against those interested under the assurance till the expiration of twelve years from his wrongful entry.

Possession
by remain-
derman

The words "shall have taken effect" in sect. 6 of 37 & 38 Vict. c. 57 and sect. 23 of 3 & 4 Wm. IV. c. 27 seem to have been carefully framed to exclude the case of a person entitled in remainder actually obtaining possession during the existence of issue in tail; such possession of a remainderman would, it seems, have for the purposes of the statute just the same effect as the possession of a stranger. The intention of the provision seems to have been to make it clear that the taking possession after the failure of issue in tail by a person entitled to a particular estate in remainder expectant on the determination of the estate tail prevents any of the subsequent remainders being barred or in any way affected by the statute.

Act for the
Abolition of
Fines and
Recoveries.

The Act for the Abolition of Fines and Recoveries (3 & 4 Wm. IV. c. 74) was passed in the same session as the Act 3 & 4 Wm. IV. c. 27, but at a later period in the session. The 23rd section of 3 & 4 Wm. IV. c. 27 (now sect. 6 of 37 & 38 Vict. c. 57) seems to have especial reference to the assurances to be executed under 3 & 4 Wm. IV. c. 74, but it is not so clear whether the operation of the section is limited to such assurances or whether it extends to fines and recoveries previous to the Act 3 & 4 Wm. IV. c. 74 (1). This question is not likely now to be of much practical importance.

Inalienable
estate tail,

By a private Act of Parliament in 1555 certain lands were limited to Edward Neville in tail male, with

(1) See 1 Hayes Conveyancing, 264; Sugden's Property Statutes, 89; *Anderson v. Anderson*, 30 Beav. 209; *Penny v. Allen*, 7 De G. M. & G. 426.

remainder over and an ultimate limitation to the Crown, and it was provided that "no feoffment, discontinuance, fine, or recovery, with voucher or otherwise, or any other act or acts thereafter to be made, done, suffered, or acknowledged of the premises or any part or parcel thereof" by Edward Neville or other persons named or by any of the heirs in tail "should bind or conclude in right or put from entry the Crown or any of the heirs in tail." In 1781 George Neville, Lord Abergavenny, who was then tenant in tail in possession or heir in tail male of the said Edward Neville, granted a lease for three lives of copyhold land part of the entailed estate. The last of the three lives ended in 1832, and from that time no rent was paid to any of the persons entitled under the Act of 1555, nor was their title in any way admitted. An action to recover possession of the land was brought in 1871 by the Earl of Abergavenny, who was then entitled as tenant in tail in possession to the entailed estate. It was held by Channell and Cleasby, BB. (Bramwell, B., dissenting), that the plaintiff's title was not barred by 3 & 4 Wm. IV. c. 27 (1).

The limitations provided by the 21st and 22nd sections of 3 & 4 Wm. IV. c. 27 are defined by reference to the earlier sections of the Act, the period of limitation prescribed being "the period hereinbefore limited." This being so, the provisions contained in the 14th section of 3 & 4 Wm. IV. c. 27 with respect to acknowledgments of title and those contained in the 3rd and 5th sections of 37 & 38 Vict. c. 57 and the 18th section of 3 & 4 Wm. IV. c. 27, relating to cases of disability, apply to all cases where a bar is attempted to be set up under the 21st and 22nd sections of 3 & 4 Wm. IV. c. 27.

Acknowledgments and disabilities.

The 6th section of 37 & 38 Vict. c. 57 (substituted for

(1) *Earl of Abergavenny v. Brace*, L. R. 7 Exch. 145; 41 L. J. Exch. 120. See *Mayor of Brighton v. Guardians of Brighton*, 5 C. P. D. 368; *ante*, p. 296.

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the 23rd section of 3 & 4 Wm. IV. c. 27) has no reference to the other sections of the Acts, and it extinguishes the title of remaindermen at the end of twelve years from the moment when time has begun to run under this section, without making any provisions for acknowledgments or disabilities, so that no disability existing in the person of a remainderman, and no acknowledgment made to him, even if at the time of such disability existing or acknowledgment being made his right to recover the property has accrued in possession, will prevent or delay the operation of this section in extinguishing his title.

In the case of *Murray v. Watkins* (1) the plaintiff's mother was tenant in tail by descent of the property in question and became entitled to possession in 1871. She was then under no disability, but in 1875 she married, and in 1882 she died, never having been in possession of the property, and leaving one son, the plaintiff, an infant. The plaintiff in 1889 by his next friend commenced an action to obtain possession of the property; but it was held that the plaintiff was barred; as he claimed under his mother, and her right accrued in 1871, the statute began to run then, and did not cease running either because of her subsequent disability or of the disability of the plaintiff.

(1) *Murray v. Watkins*, 62 L. T. 796.

CHAPTER XVII.

ABOLITION OF REAL ACTIONS (3 & 4 WM. IV. C. 27,
SS. 36, 37, 38, 39).

BEFORE the statute 3 & 4 Wm. IV. c. 27 a person entitled to an estate in land might be deprived of his right of entry by a variety of circumstances beyond his own control, and in such cases he might be put to his real action, the right to which might survive much longer than the right to bring ejectment. The object of the statute 3 & 4 Wm. IV. c. 27 being to provide one period of limitation for the recovery of land in all cases, a section (sect. 36) was inserted for the abolition of real actions, and, lest this should leave some parties entitled without any remedy, provision is made (sect. 39) that no right of entry shall be taken away by any of the means other than lapse of time by which such a right might have been destroyed under the former law. The effect of the 36th section of 3 & 4 Wm. IV. c. 27 was absolutely to abolish as from the 31st day of December 1834, subject to the savings of sects. 37 and 38, every real and mixed action except writs of right of dower, of dower *unde nihil habet*, *quare impedit* and ejectment. Dower, writ of right of dower, and *quare impedit* were abolished as real actions by sect. 26 of the Common Law Procedure Act, 1860 (1). The 26th section of the latter Act was repealed by the Statute Law Revision and Civil Procedure Repeal Act, 1883 (2), but that repeal is not to revive

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CH. XVII.Real actions
before the
statute.3 & 4 Wm.
IV. c. 27, s.
36.

(1) 23 & 24 Vict. c. 126.

(2) 46 & 47 Vict. c. 49.

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any “usage, practice, procedure, or other matter or thing not existing or in force at the passing of this Act.” The Statute Law Revision Act, 1874 (37 & 38 Vict. c. 35) repealed the exception in 3 & 4 Wm. IV. c. 27, s. 36 as to writ of right of dower, of dower *unde nihil habet*, and *quare impedit*; after the Common Law Procedure Act, 1860, ejectment was the only one of the real or mixed actions that remained. The Statute Law Revision Act, 1874, also repealed the saving sections 37 and 38 of 3 & 4 Wm. IV. c. 27, which were only provisoes to sect. 36 and of temporary application. Sect. 36 of 3 & 4 Wm. IV. c. 27 is itself repealed by the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59), but that Act expressly provides (sect. 4, subs. 4) that the repeal is not to revive or restore any “usage, practice, procedure, or other matter or thing not existing or in force at the passing of this Act.” Some of the peculiarities of the old action of ejectment still remain in existence, although there is no longer an action of ejectment; but since the Judicature Act, 1873, such an action is now called “an action for the recovery of land” (1).

The 39th section of 3 & 4 Wm. IV. c. 27 is still in force, and, as amended by 53 & 54 Vict. c. 51, is as follows:

39th section of 3 & 4 Wm. IV. c. 27.

“No descent cast, discontinuance, or warranty which may happen or be made shall toll or defeat any right of entry or action for the recovery of land” (2).

(1) R. S. C., 1883, O. xviii. r. 2; R. S. C. Ir. 1891, O. xvii. r. 2. *Gledhill v. Hunter*, 14 Ch. D. 492.

(2) See note to Watkins on Descents, 4th ed. p. 3. Co. Lit. 244a.

CHAPTER XVIII.

LIMITATIONS OF EQUITABLE RIGHTS TO REAL PROPERTY
(3 & 4 WM. IV. C. 27, SS. 24, 25).

THE first twenty-three sections of 3 & 4 Wm. IV. c. 27 only limited the time for making an entry or distress or bringing an action at law to recover any land or rent, and did not apply to any remedies in equity. The amending Act (37 & 38 Vict. c. 57) applies to proceedings in equity as well as at law. Special remedies as to proceedings in equity were provided for by the 24th and three following sections of the Act 3 & 4 Wm. IV. c. 27.

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The 24th and 25th sections of 3 & 4 Wm. IV. c. 27, which must be considered in reference to one another, are as follows :

“No person claiming any land or rent in equity shall bring any suit to recover the same but within the period during which by virtue of the provisions hereinbefore contained he might have made an entry or distress or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest, or right in or to the same as he shall claim therein in equity.”

Sect. 24 of
3 & 4 Wm.
IV. c. 27.

“Provided always, and be it further enacted that when any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee or any person claiming through him, to recover such land or rent shall be deemed to have first accrued according to the meaning of this Act at and not before the time at which such land or rent shall have been

Sect. 25 of
3 & 4 Wm.
IV. c. 27.

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conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him."

The effect of the 24th section of 3 & 4 Wm. IV. c. 27 is, so far as the limitation of time is concerned, to place (subject to the exceptions contained in the 25th and 26th sections hereinafter mentioned) every remedy in equity for the recovery of land or rent in the same position as if it were a remedy at law, and this not only as to the time of limitation, but as to the time at which the right to sue is to be deemed to have accrued, and as to all exceptions on the ground of disability or otherwise (1). The 24th section deals with equitable rights other than the rights of *cestuis que trustent* arising under express trusts. The 25th section deals with express trusts as against a trustee or those claiming under him (2). It should be noticed that all the provisions of 37 & 38 Vict. c. 57 apply to "suits" in equity as well as to "actions" at law.

We have seen (3) that before the passing of the Act 3 & 4 Wm. IV. c. 27 Courts of Equity acted on the same principle and followed the Statutes of Limitation then in force. Thus the provisions of 21 Jac. I. c. 16 as to actions of ejectment were applied to redemption suits (4), while on the other hand there was no limitation in equity to the recovery of rent-charges, because none of the old Statutes of Limitation applied to any remedy at law for their recovery (5). Redemption actions are now specially provided for by the 28th section of 3 & 4 Wm. IV. c. 27 (6). With this exception it may be taken

(1) See *Hicks v. Sallitt*, 3 De G. M. & G. 782; *Thompson v. Simpson*, 1 Dru. & War. 459, 489; *Attorney-General v. Magdalen College*, 6 H. L. 189, 215.

(2) *Attorney-General v. Flint*, 4 Hare, 155.

(3) Part IV. Ch. I. p. 237.

(4) *Belch v. Harvey*, Sugd. Vendors, 10th ed. App. 34; 3 P. Wms. 287; *Bonny v. Ridgard*, cited *Beckford v. Wade*, 17 Ves. 97; *White v. Ewer*, 2 Vent. 340; *Aggas v. Pickerell*, 3 Atk. 225.

(5) *Stackhouse v. Barnston*, 10 Ves. 453, 467.

(6) See *post*, Part V. Ch. XXI.

that every suit in equity, the nature of which is in any way to recover land or rent, is within the 24th section of 3 & 4 Wm. IV. c. 27 as well as within the express provisions of 37 & 38 Vict. c. 57.

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The 24th section of 3 & 4 Wm. IV. c. 27 has been held to apply to a suit by a remainderman in tail against the personal representative of a tenant for life for equitable waste committed by the tenant for life, on the ground that such waste is in effect an abstraction of part of the inheritance, so that the period of limitation was twenty (now twelve) years; and time was held to begin to run from the death of the tenant for life (1). If legal waste by felling timber be committed by a lessee for years and a tenant for life of the reversion, the remainderman's remedy is an action of trover for the conversion of the timber or an action for money had and received when the timber is sold. The remainderman's right to an account in equity is only incident to his right to an injunction; and this remedy, both at law and in equity, is barred at the end of six years from the felling of the timber (2). But there is a remedy in equity for legal waste committed by a tenant for life who is also entitled to the next estate of inheritance in remainder, because in these circumstances there is at the time of the commission of the waste nobody entitled at law to maintain any action for it, and if the life estate and estate in remainder of the tenant for life determine together by his death without issue, there is an immediate claim against his executors on the part of all the persons entitled to the successive limitations of the estate, and at the end of six years from such death every remainderman is barred of his remedy, although his estate may not have fallen into possession within that

Suits
waste.

(1) *Duke of Leeds v. Amherst*, 2 Phillips, 117; 14 Sim. 357.

(2) *Higginbotham v. Hawkins*, L. R. 7 Ch. 676; 41 L. J. Ch. 828. *Denys v. Shuckburgh*, 4 Y. & C. Exch. 42; *Seagram v. Knight*, L. R. 3 Eq. 398; 2 Ch. 628; *Simpson v. Simpson*, 3 L. R. Ir. 308.

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period (1). In all suits for waste questions arise whether the remedy of the remainderman is an action for trover at the time of the waste committed, or whether the produce of the waste committed is to be treated as part of and following the limitations of the inheritance, and whether the tenant for life is entitled to the income of such produce during his life (2). These questions depend on the nature of the waste, and are of considerable difficulty, and it seems that their solution in each case must materially affect the question whether the time of limitation is twelve years or six, and whether the time begins to run from the death of the tenant for life or the date of the waste committed. In the cases just referred to (3) a good deal was said about the acquiescence of the remainderman in the waste during the life of the tenant for life. As a person entitled in reversion to a trust fund may prejudice his remedy for a breach of trust committed before his interest becomes an interest in possession by acquiescence in such breach before that time (4), so it would seem clear that it is not inconsistent in a case of waste to hold that time does not begin to run against the remainderman till the death of the tenant for life, and yet that the right of the remainderman may be affected by acquiescence before that event. In such cases, however, the acquiescence must, it seems, amount to something more than mere non-interference (5).

Charities.

It is now settled that charities are within the 24th section of 3 & 4 Wm. IV. c. 27, subject to the exceptions contained in the 25th section (6).

(1) *Birch-Wolfe v. Birch*, L. R. 9 Eq. 683; 39 L. J. Ch. 345.

(2) See *Bagot v. Bagot*, 32 Beav. 509; *Gent v. Harrison*, John. 517; 29 L. J. Ch. 68; *Loundes v. Norton*, 6 Ch. D. 139; and Craig on Rights and Liabilities as to Trees and Woods, cap. 15 and p. 167.

(3) And see *Harcourt v. White*, 28 Beav. 303.

(4) *Browne v. Cross*, 14 Beav. 105; *Life Assurance of Scotland v. Siddal*, 3 De G. F. & J. 58.

(5) *Life Assurance of Scotland v. Siddal*, *ubi supra*, and see *Duke of Leeds v. Amherst*, 2 Phillips, 117.

(6) See *post*, Part V. Ch. XIX.

The 24th section of 3 & 4 Wm. IV. c. 27 of course confers no remedy; but, when the equitable owners of land have a direct remedy, it is obvious that the period from which time will run against them depends entirely on the equitable limitations under which they claim and the time at which each interest under these limitations becomes an interest in possession. The 25th section will be discussed presently, but it should be remarked here that its effect is to prevent time running in favour of a trustee against a *cestui que trust* upon an express trust or those claiming through him until a conveyance for value has been made by such trustee or some one claiming through him, and that the right of the *cestui que trust* is to be deemed to accrue at the time of such conveyance. Now it is obvious that, unless this is construed as only a proviso on the 24th section, it might, instead of extending the time wherein the *cestuis que trustent* might bring their remedy, actually take it away before their right accrued. For instance, if an estate were vested in trustees upon an express trust for A. for life, with remainders over, and during A.'s lifetime the trustees conveyed for value with notice and put the purchaser into possession, then, if time ran absolutely from the date of the conveyance, every remainderman would be barred in twelve years from that date, although a remainderman's right to sue might by his remainder falling into possession have accrued within twelve years, or might not have accrued at all. The more reasonable construction would seem to be that the 25th section must be construed as in certain cases extending the time limited by the 24th section, but as in no case shortening the time which the equitable claimants would have under the 24th section, so that, in such a case as that referred to, the various remaindermen or parties under disability would have all the time allowed by the 24th section, and in addition to this, no matter when the right otherwise accrued, time could not begin to run

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When time
runs
against
cestui que
trust.

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Are *cestuis
que trustent*
barred
when
trustees
are barred?

until a conveyance had been made. This view is supported by very high authority (1).

It has sometimes been laid down in very general terms that, when the legal right of trustees is barred as against third persons, the *cestuis que trustent* are barred also. We have seen (2), however, that, even with regard to personal debts, this is not universally true, and that it is necessary to consider whether the *cestuis que trustent* have any independent remedy against the debtors, and, if any such remedy exists, how the statutes or the rules of equity adopted in analogy to them affect it, without regard to the question how the legal remedy of the trustees may be affected by the statutes. This principle is of course equally true as to suits to recover land; and when a trustee, whether on an express or implied trust, wrongfully conveys without value, or for value with notice, the purchaser takes, subject to the equities, and each of the *cestuis que trustent* having a direct remedy against him, little difficulty arises in applying the provisions of the statutes to the remedies in equity for enforcing such right.

Where, however, land is vested in trustees upon trusts, under which the persons beneficially interested take in succession by way of remainder or their rights otherwise accrue at various times, and a mere trespasser not claiming through any conveyance gains possession, a question of considerable difficulty arises, namely, whether or not, when the trustees are barred, all the *cestuis que trustent* are barred also. Now in such case it would seem that, in the absence of any special cause, the *cestuis que trustent* have no direct equity against the trespasser, their only remedy being ejectment in the name of their trustees; and it might be thought that, when the

(1) *Thompson v. Simpson*, 1 Dru. & War. 459, 489; *Attorney-General v. Magdalen College*, 6 H. L. 189, 215; and see *post*, Part V. Ch. XIX.

(2) Part IV. Ch. II. p. 251.

trustees are barred by twelve years' dispossession and their title extinguished by the operation of the 34th section of 3 & 4 Wm. IV. c. 27, as any ejectment in the name of the trustees must then fail, all the *cestuis que trustent* must be without remedy, and therefore that they are practically barred at the same time as their trustees, even though the right to use the name of the trustees for the purpose of recovering possession has, from the nature of the equitable limitations, not accrued within twelve years or even at all. It may be thought, moreover, that not only are the *cestuis que trustent* practically without remedy, but that their interests are, by the operation of the statute, altogether destroyed, as, those trusts being merely trusts affecting the estate of the trustees, when the title to such estate is extinguished, the title of the *cestuis que trustent* to their interests must be extinguished also. Mr. Lewin (1) seems to have thought that this is the correct view, and that, as soon as a trespasser has been in possession long enough to bar the legal title of the trustees, the title of the *cestuis que trustent*, whether entitled in remainder or not, whatever may be the limitations under which they claim, is barred also. When, however, the number of settlements is considered in which the limitations are equitable, but where the persons beneficially entitled under the limitations are the only owners known to the world, and the trustees, though having the legal estate vested in them, never interfere in the management of the property, it is obvious that this view would lead to very startling consequences, and this would especially be the case when the only reason that the estates of the parties beneficially entitled are equitable is that at the time of the settlement the legal estate has for some reason been outstanding. And there seems to be a fallacy in saying that, when the legal estate of a trustee ceases to exist, the trusts of that estate cannot exist either, for, if an

(1) Lewin on Trusts, 9th ed. p. 988.

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estate be conveyed or devised to trustees on certain trusts, and those trustees disclaim so that the estate never vests in them, the equitable estates do not drop, but exist as binding the legal estate in the hands of those on whom it devolves in consequence of the disclaimer.

It may be said too that, as the 34th section only extinguishes the title of the person whose remedy is barred, leaving the occupant with a title gained by possession and resting on the inability of others to eject him (1), the extinction of the title of the trustee cannot of itself extinguish the title of the equitable owners; that, on the contrary, their title cannot be extinguished by the operation of the 34th section until the prescribed period has elapsed after their right to sue in the name of the trustee has accrued, or would, if such remedy existed, have accrued, having regard to the equitable limitations. If this be right, the trespasser in the case supposed would after the lapse of twelve years have a title subject to be defeated by any existing estate or interest, and there would be actual subsisting equitable estates recognised as such now by all Courts, the persons entitled to such estates or interests being the substantial owners of the land. In these circumstances the Courts would scarcely allow any extreme technical view to defeat the rights of the parties; but in any action for the recovery of land brought by the beneficial and substantial owners in the name of the trustees, or by the equitable owners in their own names, the Courts would not allow the trespasser to make use of the statute to defeat such substantial existing rights (2). It is believed that the actual point has never been the subject of a legal decision, but the view here advocated would seem to be supported by the judgment of the House of Lords in *Scott v. Scott* (3).

(1) See *post*, Part V. Ch. XXV.

(2) See *Scott v. Scott*, 11 Ir. Eq. 487; 4 H. L. 1065; Judicature Act, 1873, s. 24, subs. (3).

(3) 4 H. L. 1065; in the Court below, 11 Ir. Eq. R. 487.

In that case John Scott, the owner in fee of the property in question, subject to a legal mortgage in fee, by a deed dated February 1807, settled the equity of redemption on himself for life, with remainder to his eldest son Bindon for life, with remainder to the first and other sons of Bindon in tail male. By a deed dated June, 1807, John Scott and his son Bindon purported to settle the same equity of redemption on John Scott for life, with remainder to another son William for life, with remainder to the first and other sons of William in tail male. John Scott died in 1808, Bindon died in 1837, leaving the plaintiff, John Bindon Scott, his eldest son. William went into possession on the death of John Scott and remained in possession until his own death in 1843, when his eldest son John Scott the younger, one of the defendants, went into possession as tenant in tail under the second settlement. Bindon had in 1811 taken a conveyance of the legal estate from the mortgagee, and such legal estate, irrespective of any question of the Statute of Limitations as affecting it, descended on his death to John Bindon as his heir-at-law. John Bindon was also entitled as tenant in tail under the equitable limitations of the first settlement, if valid. Questions arose as to the consideration for and the registration of these settlements, and the substantial point at issue between the parties was whether those claiming under the first or under the second settlement had the higher equities and which settlement therefore prevailed. In 1844 John Bindon, relying on the legal estate got in by his father, brought ejectment in the Court of Queen's Bench in Ireland against John Scott the younger, and failed on the ground that the only title in John Bindon which would be recognised at law was the legal estate acquired by his father, and that such legal title was barred by the statute. John Bindon then filed his bill against John Scott the younger, praying that the trusts of the deed of February, 1807, might be

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carried into execution and the plaintiff declared entitled to the possession, and that the reconveyance of the mortgage might be declared to have been obtained by Bindon Scott, as a trustee on behalf of the several persons claiming any estate in the land or in the equity of redemption under the deed of February, 1807, or that the defendants might be compelled in any ejectment to be brought by the plaintiff to admit that John Scott the elder was seised in fee simple at the time of the execution of that deed. Brady, L.C., thought it would have been competent for the plaintiff in ejectment to have shown the character of the possession obtained by the defendants, but taking the decision of the Queen's Bench on that point as it stood, he considered it no answer to the plaintiff's claim in a Court of Equity, and being of opinion that the first settlement prevailed, he was prepared to make a decree at once in favour of the plaintiff; but on the application of the defendants, who wished, it seems, to have the question of consideration for the settlement submitted to a jury, he left the plaintiff to try the question at law on the terms of the defendant admitting that, at the time of the execution of the first settlement, John Scott the elder had the legal estate in fee simple. On that assumption it was of course clear that in any event the second settlement operated to pass the life estate of Bindon, and consequently that the possession of William was in every view of the case in accordance with his title until the death of Bindon in 1837, and until that time was not in any sense wrongful or adverse to anybody. It having been ultimately decided at law that the first settlement was made for good consideration, the plaintiff got his decree, and this decision was affirmed on appeal in the House of Lords.

But for the decision of the Court of Queen's Bench in the first ejectment that the legal title of John Bindon was extinguished, this case could be easily distinguished

from that of a mere trespasser obtaining possession of land of which the limitations are equitable; for, apart from the questions that arose on the statute, any of the parties claiming under either of the settlements of John Scott the elder had a right to file a bill in equity against the person in whom the legal estate was vested and the persons claiming under the other settlement to determine their rights; thus the case was always within the jurisdiction of a Court of Equity. Moreover, as Lord St. Leonards pointed out, until the death of Bindon in 1837, as the property was held according to the equitable rights, the possession of William was the possession of the trustee, and the Court was in fact asked to put the plaintiff in a worse position than he would otherwise have been in, because his father had got in the legal estate, or to decide against the plaintiff because he had too much estate, not because he had too little.

In this view of the case, John Bindon would have succeeded at law, and the case would have had no reference to the point now under discussion. But neither the Court below nor the House of Lords considered itself called upon to reverse the decision of the Queen's Bench, and the judgments in both Courts treated it as standing. This being so, the case appears almost the same as if John Scott the younger had acquired a title by the statute as a perfect stranger, for Bindon Scott, when he took the conveyance of the legal estate, necessarily took it as a trustee for the persons beneficially entitled who claimed through John Scott the father, whoever these might be; that is, according to the decision, as trustee for the persons claiming under the first settlement, who obtained relief and were decreed possession by the Court of Equity, although it was admitted for the purpose of the decision that the title of their trustee was extinguished at law. It is true that the persons claiming under either settlement had always

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a remedy in equity to have their rights determined as against the persons claiming under the other settlement, but their equity was not against the persons claiming under the other settlement alone, but to file a bill against the trustee and those persons for a declaration of rights and consequential relief. Therefore, when the legal right of Bindon as trustee was extinguished, the persons claiming under the first settlement had, it seems, no equity against John Scott the younger alone, unless his title at law, which was acquired by the statute by the extinction of the legal title of Bindon, was subject to the same equities as the legal title of Bindon had been.

Some passages in the judgments in the House of Lords show that this was in the minds of the learned lords in deciding the case. Lord Cranworth, L.C., says (1):—"With regard to the suggestion that this outstanding legal fee acquired by disseisin is to defeat the rights of the parties, I do not concur in the observations which have been made. It is admitted that if the party who, by virtue of the Statute of Limitations, claimed to get the legal fee, had got it by conveyance with notice that the party from whom the conveyance proceeded was a trustee, he could not have taken it except upon the trusts upon which the party from whom he took it held." Lord St. Leonards also, after expressing his opinion that the judgment at law was erroneous, says (2):—"However, it was decided otherwise, and this House is not called on to reverse the decision. Then, as regards the equity, I can have no doubt in recommending your Lordships to hold as a point of law not to be disputed that that legal estate became a trust for all these persons, and that, although at law William Scott might himself, as against the children of Bindon Scott, set up his possession, it was in reality no adverse possession." These passages amount, if not to a decision,

(1) 4 H. L. p. 1082.
(2) 4 H. L. p. 1085.

at least to a strong intimation of opinion that a disseisor who has acquired as against a trustee a title to land by the operation of the statute with notice of the equities to which the land was subject in the hands of the disseisee can only hold it subject to the same equities; and looking at the terms on which the second ejectment in the case referred to was directed to be tried and which were approved by the House of Lords, that case seems authoritatively to suggest a method by which the Courts may prevent the rights of substantial owners being prejudiced by the extinction, through the operation of the statute, of the legal title of a trustee, which, if in existence, would have effectually protected such rights.

When the Court is during the pendency of an action in possession of property by a receiver, that possession enures for the benefit of the party to the action ultimately declared to be entitled, so that during such possession time will run against any person who is a stranger to the suit, though it cannot run in favour of such person (1).

Land in
possession
of a re-
ceiver.

In *Penney v. Todd* (2) a mortgagee obtained the appointment of a receiver over the mortgaged property, and the mortgagee's solicitor, in a letter to an annuitant whose annuity was charged on the property, stated that the balance of the rents would be paid to the annuitant. Malins, V.-C., held that this letter put the annuitant in the same position as if the receiver had been appointed on his application, and so prevented the statute from running against his claim.

In *Smith v. O'Grady* (3) an action was brought in 1865 by the executor of an executor for an adminis-

Right of
executor to
an account

(1) *Wrixon v. Vize*, 3 Dru. & War. 104, 123; *Harrison v. Duignan*, 2 Dru. & War. 295; *Hunt v. Bateman*, 10 Ir. Eq. R. 360, 378; *Groom v. Blake*, 8 Ir. C. L. R. 428; *Re Butler's Estate*, 13 Ir. Ch. R. 453.

(2) 26 W. R. 502.

(3) L. R. 3 P. C. 311.

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tration of the real and personal estate of the original testator. The original testator died in 1832, bequeathing the residue of his estate to his grandchildren, who were then minors, and appointing A. one of his executors, and naming him guardian. A. took possession both of the real and personal estate of the testator and received the rents and profits until 1840, when a guardian of the infant grandchildren was appointed, and went into possession of the real estate. In 1841 the accounts of A. in relation to the testator's estate were closed, but not settled. A. died in 1850—the plaintiff was his executor. The Privy Council held, reversing the decision of the Vice-Chancellor of the Court of Chancery in Jamaica, that, notwithstanding the delay, the plaintiff was entitled to an account of the receipts of rents and profits of the real as well as of the personal estate by A., and to an account whether any sum was due to the plaintiff as executor of A. in respect thereof. The decision seems to amount to this, that, where a trustee who is the receiving party comes and asks for an account, mere lapse of time will not deprive him of his right to have his rights and liabilities as an accounting party ascertained.

CHAPTER XIX.

EXPRESS TRUSTS AFFECTING REAL PROPERTY (25TH SECTION OF 3 & 4 WM. IV. C. 27 AND 10TH SECTION OF 37 & 38 VICT. C. 57).

THE 24th section of 3 & 4 Wm. IV. c. 27 having created a bar by lapse of time to the recovery of equitable interests in land or rent, the 25th section provides an exception in favour of those claiming under express trusts, and renders lapse of time unimportant in all cases within the section, that is, between the *cestui que trust* and the trustee, until the trust is disturbed; a disturbance can only be affected by such a denial of the trust as takes place when the trustee sells to a third party for valuable consideration the property so held by him in trust (1). The possession of the trustee is in effect deemed to be the possession of the *cestui que trust* until the trustee disclaims the trust by alienation to a purchaser; that is an act sufficient to put the *cestui que trust* on his guard, and he is bound to bring his action within twelve years (2). So long as a trustee receives the rents of an estate, time will not run against the *cestui que trust*, even though the trustee account for the rents to a person not entitled (3).

The 25th section follows the wording of the 24th, on which it seems to be engrafted as an exception applying

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Effect of
25th sec-
tion of
3 & 4
Wm. IV.
c. 27.

Express
trusts.

Trusts to
raise
money out
of land.

(1) *Law v. Bagwell*, 4 Dru. & War. 398, 408.

(2) *Per Pennefather, B.; Hunt v. Bateman*, 10 Ir. Eq. R. 380.

(3) *Lister v. Pickford*, 34 L. J. Ch. 582; and see *Christ's Hospital v. Grainger*, 1 Mc. & G. 460.

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only to claims to the same subject-matter as therein referred to, viz. land or rent (*i.e.* rent-charge). No similar exception was made in direct terms for express trusts in those cases where the *cestuis que trustent* claimed not estates in land or rent, but charges on them which would come within the provisions of the 40th and 42nd sections of 3 & 4 Wm. IV. c. 27. But after some differences of opinion (1) it was finally settled that a similar exception existed in these cases, and that time would not run under the 40th and 42nd sections of 3 & 4 Wm. IV. c. 27 where the money claimed was secured by an express trust (2).

37 & 38
Vict. c. 57,
s. 10.

Now, however, the law is altered by the Real Property Limitation Act, 1874 (3), s. 10 of which provides that the time for recovering a sum of money charged on land or for recovering arrears of interest is not to be enlarged by an express trust to secure the same. The section is as follows:—

“No action, suit or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent at law or in equity and secured by an express trust or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust.”

(1) *Knox v. Kelly*, 6 Ir. Eq. R. 279; *Burne v. Robinson*, 1 Dru. & Walsh, 688.

(2) *Burrowes v. Gore*, 6 H. L. 907, 961; *Hunt v. Bateman*, 10 Ir. Eq. R. 360; *Dillon v. Cruise*, 3 Ir. Eq. R. 70; *Young v. Waterpark*, 13 Sim. 204, affirmed on appeal, 15 L. J. Ch. 63; *Dundas v. Blake*, 11 Ir. Eq. R. 138; *Blair v. Nugent*, 3 Jo. & Lat. 658, 668; *Ward v. Arch*, 12 Sim. 472; *Gough v. Bult*, 16 Sim. 323; *Watson v. Saul*, 1 Giff. 188; *Cox v. Dolman*, 2 De G. M. & G. 592; *Shaw v. Johnson*, 1 Drew & Sm. 412; *Snow v. Booth*, 8 De G. M. & G. 69; *Earl of Mansfield v. Ogle*, 24 L. J. Ch. 700; *Lewis v. Duncombe*, 29 Beav. 175; *Re Wyse*, 4 Ir. Ch. R. 297; *Blower v. Blower*, 5 Jur. N. S. 33; *Lawton v. Ford*, L. R. 2 Eq. 97; *Mutlow v. Bigg*, L. R. 18 Eq. 246.

(3) 37 & 38 Vict. c. 57.

The effect of this section is that a trust does not now keep alive the principal of a debt charged on land longer than a mere charge, that is, for a longer time than twelve years (1), and that the arrears in such a case can only be recovered for six years.

Where real estate was conveyed to trustees upon trust to pay an annuity to A. and his heirs, and more than twelve years elapsed without any payment in respect of such annuity being made, it was held by Kay, J., that the annuity being a "rent" within the interpretation clause of 3 & 4 Wm. IV. c. 27 and being secured by an express trust was not extinguished, but that the effect of sect. 10 of 37 & 38 Vict. c. 57 was to prevent any arrears of the annuity being recovered, because for the purpose of the recovery of arrears the claim was to be treated as if there had been no trust, and if there had been no trust, no arrears would have been recoverable (2). It would seem a more reasonable construction of the section to say that, where the annuity is not extinguished, the right to recover arrears is limited to six years, the time prescribed in the case of arrears not secured by a trust. According to the rule laid down in *Hughes v. Coles*, the right to the rent or annuity as an inheritance is not barred; but no distress or action can be brought to recover any payment in respect of it, as no such proceeding can be taken till some instalment is in arrear. The construction placed by Kay, J., on the 10th section of 37 & 38 Vict. c. 57 has been disapproved in Ireland by Porter, M.R., in the case of *Dower v. Dower* (3), but in that case the question of a trust did not directly arise.

The 10th section of 37 & 38 Vict. c. 57 only applies to proceedings to recover money as against the land charged to secure it, and does not protect a trustee from his

(1) *In re Stephens*. *Warburton v. Stephens*, 43 Ch. D. at p. 43. *In re Nugent's Trusts*, 19 L. R. Ir. 140.

(2) *Hughes v. Coles*, 27 Ch. D. 231. See *In re Nugent's Trusts*, 19 L. R. Ir. 140.

(3) 15 L. R. Ir. 264. See *In re Nugent's Trusts*, 19 L. R. Ir. 140.

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2.

personal liability to his *cestui que trust* (1). With regard to this personal liability of a trustee the general rule of equity is expressly enacted by the Judicature Act, 1873 (2), sect. 25, subsect. 2 of which is as follows:—

“No claim of a *cestui que trust* against his trustee for any property held on an express trust or in respect of any breach of such trust shall be held to be barred by any Statute of Limitations.”

The Judicature Act, 1873, was passed in the year before the Real Property Limitation Act, 1874, but came into operation on the 1st November, 1875, while the Real Property Limitation Act, 1874, did not come into operation till the 1st January, 1879. The Supreme Court of Judicature Act (Ireland), 1877 (3), was passed three years after the Real Property Limitation Act, 1874, but came into operation before, viz. on the 1st January, 1878. Section 28, subsect. 2 of the Irish Act contains the same provisions as sect. 25, subsect. 2 of the English Act, but contains in addition the following words:—

“This provision, however, is not to affect the enactments contained in the tenth section of the Real Property Limitation Act, 1874, when the same shall come into effect” (*i.e.* 1st January, 1879).

Trustee
Act, 1888,
s. 8.

Some protection is given to trustees who have not been guilty of fraud or have not themselves appropriated trust property by the 8th section of the Trustee Act, 1888 (4), the provisions of which are as follows:—

(1) “In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof still re-

(1) *In re Blachford*. *Blachford v. Worsley*, 27 Ch. D. 676. See *Fearnside v. Flint*, 22 Ch. D. 579.

(2) 36 & 37 Vict. c. 66.

(3) 40 & 41 Vict. c. 57.

(4) 51 & 52 Vict. c. 59.

tained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—

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(a) “All rights and privileges conferred by any Statute of Limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding, if the trustee or person claiming through him had not been a trustee or person claiming through him.

(b) “If the action or other proceeding is brought to recover money or other property, and is one to which no existing Statute of Limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.

(2) “No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded.

(3) “This section shall apply only to actions or other proceedings commenced after the first day of January 1890, and shall not deprive any executor or administrator

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What are
express
trusts.

of any right or defence to which he is entitled under any existing Statute of Limitations."

The 25th section of 3 & 4 Wm. IV. c. 27 is confined to cases of express trusts, that is, to cases where real property is vested in trustees on trust, either declared in express terms by the deed, will, or other written instrument, or else stated in such language that by the rules of construction put on that language by Courts of Equity, the legal estate is vested in the trustees, and the beneficial estate or possession in another (1). But where a person has been in possession, not being a trustee under a written instrument, but still being in such circumstances that he would be held a trustee in equity, the 25th section of 3 & 4 Wm. IV. c. 27 does not apply; and if the possession of such a constructive trustee has continued for more than twelve years, he may set up the statute against the person who, but for the lapse of time, would be the right owner (2). Where, therefore, a person having a limited interest in renewable leaseholds takes the renewal in his own name in such circumstances that in equity he would be held a trustee subject to his own interest for the other persons beneficially entitled, the 25th section of 3 & 4 Wm. IV. c. 27 has no application to take the case out of the operation of the statute, and an action to recover the property must be brought within the time limited by the 24th section (3). Where a trustee in whom an estate was vested on express trusts died, and his sister, on whom the trust estate did not descend, entered into possession and assumed to act as trustee, she was held to have put herself in the position of an express trustee. If she had by writing declared

(1) *Hunt v. Bateman*, 10 Ir. Eq. R. 360; *Drummond v. Sant*, L. R. 6 Q. B. 763; *Dawkins v. Lord Penrhyn*, 4 App. Cas. 51; *Cunningham v. Foot*, 3 App. Cas. 974. *In re Nugent's Trusts*, 19 L. R. Ir. 140.

(2) *Petre v. Petre*, 1 Drew. 371, 393; and see *Henderson v. Atkins*, 28 L. J. Ch. 913; *Sands to Thompson*, 22 Ch. D. 614. *In re Dane's Estate*, 5 Ir. R. Eq. 498.

(3) *Petre v. Petre*, *ubi supra*. *In re Dane's Estate*, *ubi supra*.

herself to be a trustee, the trust in her could not have been otherwise than express; and her conduct was equivalent to her written declaration (1).

In the Irish case of *Smith v. Smith* (2), a testator who died in 1803 appointed his brother R. and his son W. trustees of his will, and directed them to let his freehold lands for such term as they should think advisable, and that W. should receive the rent upon certain trusts for the benefit of himself and other children of the testator. W. executed the trusts till his death in 1818, when the whole of the rent was received by his eldest son H. for his own benefit, and on the death of H. by his eldest son, the defendant. In 1875 one of the *cestuis que trustent* under the testator's will filed a bill for an account. It was held that evidence of family reputation was admissible to prove that W. survived R., and that, assuming the legal estate to have been vested in both W. and R., the plaintiff was entitled to an account by virtue of sect. 25, as the trust was an express trust, and both H. and the defendant were express trustees, but that the account owing to the great delay should not go further back than the filing of the bill.

The result of the 10th section of 37 & 38 Vict. c. 57, as we have just seen, is that a trust impressed on land for the payment of money does not keep the debt alive as against the land any longer than if it were a charge. But where an annuity was charged on land on an express trust but no payment had been made in respect of the annuity for more than twelve years, Kay, J., held that sect. 10 of 37 & 38 Vict. c. 57, although operating to prevent the recovery of arrears, did not extinguish the annuity itself, and that the land remained charged with it (3). Therefore, in cases where periodical payments

(1) *Life Association of Scotland v. Siddal*, 3 De G. F. & J. 58; 7 Jur. N. S. 785.

(2) *Smith v. Smith*, 1 L. R. Ir. 206.

(3) *Hughes v. Coles*, 27 Ch. D. 231. See *ante*, p. 429.

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are charged upon land and secured by an express trust, the statute only runs as against each payment from the time when it falls due, and, although no payment be made for more than twelve years, yet this will not affect the right to recover future payments out of the land. The question therefore is still of importance whether an express trust has been impressed on land or only a charge created. It may, it seems, be now treated as settled that a devise to a person beneficially subject to an annuity or other series of periodical payments does not create an express trust so as to except the case from the operation of the statute (1); and if land be conveyed to a person beneficially subject to such a charge which the grantee covenants with the grantor to pay, the same principle applies (2); in such cases the charge merely imposes on the devisee or donee of the land an obligation in favour of the persons entitled to the charge, but it does not invest such devisee or donee with a fiduciary character (3).

If, however, a testator charges his lands with sums of money, and subject thereto devises to a person, not for his own benefit, but upon trusts, then it would seem clear that an express trust is created in favour of the persons entitled to the charge. Thus, where land was devised to trustees, subject to a charge of annuities in trust to convey in strict settlement (4), it was held that the 25th section of 3 & 4 Wm. IV. c. 27 excepted the claim from the operation of the statute, one of the purposes to which the land was applied being the satisfaction of the charge; and in such a case, even since 37 & 38 Vict. c. 57, such

(1) See *Francis v. Grover*, 5 Hare, 39; *Hunt v. Bateman*, 10 Ir. Eq. R. 360; *Jacquet v. Jacquet*, 27 Beav. 332; *Dickenson v. Teasdale*, on appeal, 1 De G. J. & Sm. 52.

(2) *Harrison v. Duignan*, 2 Dru. & War. 295; *Hughes v. Kelly*, 3 Dru. & War. 482; and see *Massy v. O'Dell*, 10 Ir. Ch. R. 22.

(3) See *Thomson v. Eastwood*, 2 App. Cas. 215; *Cunningham v. Foot*, 3 App. Cas. 974.

(4) *Commissioners of Charitable Donations v. Wybrants*, 7 Ir. Eq. R. 580; 2 Jo. & Lat. 182.

an annuity would not, it seems, be extinguished by non-payment of the instalments for more than twelve years (1). But the effect of the 10th section of 37 & 38 Vict. c. 57 is to bar, at the end of twelve years, the recovery of any sum or instalment which is charged on land on an express trust, and has become payable (1), or at least to prevent more than six years' arrears being recovered (2).

If lands be conveyed to trustees upon express trust as to a partial interest therein or as to a charge on the property, and there is no trust declared concerning the residue, such trustees hold upon an express trust within the meaning of the 25th section of 3 & 4 Wm. IV. c. 27, not only for the persons entitled to the charge or partial interest, but also for the persons entitled to the residue by virtue of the resulting trust. Thus where a testator devised two freehold farms to S. R. for a term of ninety-nine years, in trust to pay two annuities to his daughters and the survivor of them, and a third annuity to J. F. for life, and in case both the daughters should die without leaving issue married, or attaining twenty-one, then he devised the said farms to S. R. for ever, he paying the annuity to J. F.; it was held that there was after the payment of the annuities a resulting trust of the surplus interest in the term in favour of the heir, and that this was an express trust within the 25th section, as the trust arose on the face of the instrument (3).

Resulting trust.

Where land was conveyed to trustees on trust for a charity by a grant which was void under the Mortmain Act (4), it was held that there was no trust in favour of the representatives of the settlor, and, as the trustees had for more than twelve years had possession, and had applied the income according to the trusts, the right

Void grant on charitable trusts.

(1) *Hughes v. Coles*, 27 Ch. D. 231. *In re Nugent's Trusts*, 19 L. R. Ir. 140.

(2) See *ante*, p. 429.

(3) *Salter v. Cavanagh*, 1 Dru. & Walsh, 668. See *Patrick v. Simpson*, 24 Q. B. D. 128; *Nugent v. Nugent*, 15 L. R. Ir. 321.

(4) 9 Geo. II. c. 36, s. 3. See now 51 & 52 Vict. c. 42.

PART V. of the settlor's representatives was barred by the
CH. XIX. statute (1).

Mortgages. Where a mortgagee of an estate made his will and devised all his mortgage estates to trustees upon trust on payment of the moneys due on the mortgages to convey the mortgaged estates to the person who should be entitled to the equity of redemption, and after making his will he purchased the equity of redemption in the mortgaged property, and the trustees after his death entered into possession of the mortgaged property and administered it as part of the testator's estate, it was held that the purchase of the equity of redemption revoked the devise by the will, not only of the beneficial interest, but also of the legal estate in the mortgaged property, that the testator died intestate as to such property, that the trustees were not trustees of such property for the heir, and that the 25th section of 3 & 4 Wm. IV. c. 27 did not apply (2).

Where property is mortgaged and all the mortgage debt is paid, but no reconveyance is made, and the mortgagor is in possession, the mortgagee is a trustee of the legal estate, but there is no express trust, and neither sect. 25 of 3 & 4 Wm. IV. c. 27, nor the proviso to sect. 7 of that statute applies, and the legal estate of the mortgagee in the property will be barred at the expiration of thirteen years from the payment of the mortgage debt, the mortgagor in such a case being tenant at will of the mortgagee (3).

Where land is mortgaged to a trustee for several persons who advance the mortgage money, and the ordinary power of sale is given to the trustee, with a declaration that out of the proceeds he is to pay the principal and interest, then, although when the money is raised and is in the trustee's hands, he holds it as

(1) *Churcher v. Martin*, 42 Ch. D. 312.

(2) *Yardley v. Holland*, L. R. 20 Eq. 428.

(3) *Sands to Thompson*, 22 Ch. D. 614.

trustee for the persons entitled, yet as between mortgagor and mortgagee it is a charge simply, and there is no trust for the payment of the mortgage debt impressed on the land (1). When a mortgage is in the form of a trust for sale, the trust not being enforceable at law, the possession of the mortgagee under such a mortgage is not the possession of a trustee, and the mortgagor will not be protected by sect. 25 of 3 & 4 Wm. IV. c. 27 (2).

Where a vendor has a lien for unpaid purchase money, there is no express trust in his favour within the 25th section of 3 & 4 Wm. IV. c. 27 (3).

Vendor's
lien.

A testamentary guardian is always treated in equity as a trustee who cannot avail himself of the limitations contained in the statute 21 Jac. I. c. 16 (4); and, as his appointment appears from the express words of the will, he could not, it seems, take advantage of the statute 3 & 4 Wm. IV. c. 27.

A guardian
is a trustee.

If a receiver be put into possession of an estate, and be afterwards by deed directed to apply the rents and profits in payment of certain charges, according to the trusts of another deed, to which he is not a party, he is in as a receiver clothed with an express trust (5); but it would seem that the effect of sect. 10 of 37 & 38 Vict. c. 57 is to prevent the trust from keeping the charges alive any longer than if there were no trust.

Receiver
with a
trust.

Having considered what are express trusts within the meaning of the 25th section of 3 & 4 Wm. IV. c. 27, we now proceed to inquire under what circumstances such an express trust will prevent the operation of the statute; in other words, what must be the state of facts with regard to the possession of the property in order that

Possession
of trust
estates.

(1) *Mason v. Broadbent*, 33 Beav. 296.

(2) *Locking v. Parker*, L. R. 8 Ch. 30. *In re Alison. Johnson v. Mounsey*, 11 Ch. D. 284; *Chapman v. Corpe*, 41 L. T. 22.

(3) *Toft v. Stephenson*, 7 Hare, 1; on appeal, 1 De G. M. & G. 28.

(4) *Mathew v. Brise*, 14 Beav. 341.

(5) *Knight v. Bowyer*, 2 De G. & J. 421. See *Seagram v. Tuck*, 18 Ch. D. 296.

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the person claiming the benefit of the express trust may be able to take advantage of the exception provided in his favour.

When an express trust with regard to land or rent has once been created, lapse of time may affect the *cestui que trust* in two ways:—First, by barring the right of the trustees, in case they fail to obtain, or cease to continue in possession of the land or receipt of the rent; secondly, by taking away the right of the *cestui que trust* to recover the property against persons claiming through the trustees. The first point has been discussed in the preceding chapter (1), as to equitable estates in land, and it would seem that similar reasoning would apply, subject to the provisions of sect. 10 of 37 & 38 Vict. c. 57, when the persons beneficially interested are entitled, not to estates in the land, but to charges on the inheritance (2).

Trust term
to secure a
charge.

If a term be vested in trustees upon trust to raise money for other persons, it is clear that, so long as the term is a subsisting term, and the trustees can get possession of the land under the term, the right of the persons entitled to the money will be kept alive, as they have an express trust existing in their favour, and that any *cestui que trust* has a right to call upon the trustees to execute the trusts in his favour in respect as well of the principal funds as of all arrears of interest, though more than twelve years may have passed without his claim being enforced (3); and therefore, if the term at its creation was to take effect in remainder, and twelve years have not elapsed since it fell into possession, as the right of the trustees cannot be barred,

(1) Ch. XVIII.

(2) See *Hughes v. Coles*, 27 Ch. D. 231.

(3) *Young v. Lord Waterpark*, 13 Sim. 204; *Cox v. Dolman*, 2 De G. M. & G. 592; *Shaw v. Johnson*, 1 Drew. & Sm. 412; *Snow v. Booth*, 2 K. & J. 132; on appeal, 8 De G. M. & G. 69; *Earl of Mansfield v. Ogle*, 24 L. J. Ch. 700, 1 Jur. N. S. 414; *Lewis v. Duncombe*, 29 Beav. 175; *Re Wyse*, 4 Ir. Ch. R. 297; *Lawton v. Ford*, L. R. 2 Eq. 97.

the right of the *cestuis que trustent* will be preserved, even though the occasion for executing the trusts arose more than twelve years before, and the estate in remainder might then have been sold for the purpose (1). By the last clause of sect. 8, subsect. 2 (b) of the Trustee Act, 1888, after the provision allowing a trustee in certain events to plead the lapse of time in bar to an action, it is enacted that "the statute shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession." If the owner of the reversion expectant on the determination of the term allows the trusts to be partially executed by paying any sum on account of the charge, or admits the existence of the term, it would seem that within twelve years of such payment or admission the term will be treated as a subsisting term (2). A testator devised three undivided shares of land subject to a trust term for the payment of the testator's debts and legacies, which term was to cease on the trusts being fulfilled; the person entitled to one of the shares conveyed his share of the land to a creditor upon trust to pay himself his debt, and the creditor took no steps to enforce the security for more than twenty years. It was held that the term did not prevent the operation of the statute and that the creditor was barred (3).

In a case in Ireland (4), A. in 1812 granted an annuity for lives payable out of lands of which he was owner in fee in possession, and demised the lands for a term of 200 years to secure the annuity, with a proviso for cesser of the term upon the death of the survivor of the *cestuis que vient* and payment of all arrears. In 1814 A., being still in possession of the lands, granted another annuity payable out of the same lands to B., and demised the

(1) *Snow v. Booth* and *Lewis v. Duncombe*, *ubi supra*.

(2) See *Snow v. Booth* and *Lawton v. Ford*, *ubi supra*.

(3) *Humble v. Humble*, 24 Beav. 535. See *ante*, Part III. Ch. IV.

(4) *In re Bermingham's Estate*, 5 Ir. R. Eq. 147.

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lands for a term of 500 years to secure the annuity; no mention was made of the deed of 1812 in the deed of 1814. In 1820 A. became insolvent, and assignees of his estate were appointed. In 1822 the grantees of the annuity of 1812 filed a bill in the Court of Chancery against A. and his assignees; B. was not a party to the suit, and never intervened in any way. In 1828 a receiver was appointed who went into and remained in possession of the greater part of the lands charged with the annuities. In 1868 the arrears due under the annuity of 1812 were finally paid out of the proceeds of the sale of the lands charged, and, the *cestuis qui vient* having died long before, the annuity of 1812 then ceased. Up to that time no payment had been made or any acknowledgment given in respect of the annuity of 1814, except an entry in the schedule filed by A. in his insolvency. Shortly after the cesser of the annuity of 1812 the persons entitled to the annuity of 1814 laid claim to the surplus of the proceeds of the sale of the land charged. O'Hagan, L.C., and Christian, L.J., held that the claim was not barred; that, as the term of 1812 became attached in possession on the lands by the appointment of the receiver in 1828, the term of 1814 then became a reversionary term, and that the right of those entitled under it did not become an estate in possession till 1868, when the prior term ceased. The opinion was expressed that if the term of 1812 had not been attached in possession, the mere existence of the prior term would not have saved the term of 1814 from being barred. In this case it was held that the 5th section of 3 & 4 Wm. IV. c. 27 saved the title of the termor as against the reversioner from the operation of the 2nd section, while the 25th section saved the right of the annuitant against the termor from the operation of the 24th.

As to the second point, the effect of lapse of time as between the *cestui que trust* on the one hand, and the

trustees or persons claiming through them on the other, is regulated by the 24th & 25th sections of 3 & 4 Wm. IV. c. 27 and the 8th section of the Trustee Act, 1888. The last-named Act does not apply to actions where the claim is founded upon any fraud or fraudulent breach of trust, or where the claim is to recover trust property or the proceeds thereof, still retained by the trustee or previously received by the trustee, and converted to his use. Where the claim is not founded on fraud or on a fraudulent breach of trust, or is to recover trust property which the trustee has abandoned or parted with, but the proceeds of which he has not received and converted to his use, the trustee may plead lapse of time as a bar to an action against him (1), but subject to the exception that time will not begin to run against the beneficiary until his interest becomes an interest in possession. In cases not coming within sect. 8 of the Trustee Act, 1888, the right of the *cestui que trust*, as against the trustees themselves, can never be barred by effluxion of time, nor can it be barred as against persons claiming through the trustees, except where there has been a conveyance to a purchaser for value. Against such persons the *cestui que trust* will, in the absence of such conveyance, in cases unaffected by the Trustee Act, 1888, retain, in spite of lapse of time, any right of action to which, in the circumstances of the case, he was originally entitled. It is clear, indeed, that neither the 24th nor the 25th section of 3 & 4 Wm. IV. c. 27 confers any right of action; these sections do not enable a *cestui que trust* to maintain an action for the recovery of land or rent, or any charge on land in any case whatever in which, apart from the Act, 3 & 4 Wm. IV. c. 27, he would not have a right enforceable on the general principles of equity; and circumstances may deprive him of such right independently of the statute,

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Convey-
ance by
trustee
holding on
express
trusts.

(1) See *In re Bowden*. *Andrew v. Cooper*, 45 Ch. D. 444. *In re Swain*. *Swain v. Bringeman* (1891), 3 Ch. 233. *In re Page*. *Jones v. Morgan* (1893) 1 Ch. 304.

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even in the case of an express trust. Thus, if a trustee, having the legal estate, convey trust property to a purchaser for value without notice of the trust, the *cestui que trust* has, on general principles, no right in equity against such purchaser, and his right to the land is lost immediately on such conveyance. But if property pass, by the death of a trustee, to his legal representative (1), or pass to a volunteer on conveyance, the right of the *cestui que trust* is preserved, and time will not run against that right, so that, however long such a representative or volunteer hold the property with or without knowledge of the trust, he will, except in cases falling under the Trustee Act, 1888, be liable, at any time, to an action to recover the inheritance, and for an account of arrears of profits, provided there be no acquiescence or laches on the part of the *cestui que trust*.

There remains the case in which the trust property has been conveyed to a purchaser for value with notice of the trusts; in this case the *cestui que trust* retains the right to recover the property or charge against such purchaser, or any one claiming through him as a volunteer or with notice, a right, however, which will be barred twelve years after it has accrued. The *cestui que trust*, on the conveyance for value being made, is in the position of any equitable owner who has a remedy in equity, but with no express trusts in his favour; the time from which the statute begins to run depends on the nature of the equitable limitations. There is, however, this important difference in favour of the *cestui que trust*, that, while he cannot be barred in less than twelve years from the date of the conveyance, yet, owing to the nature of the limitations, the statute may begin running at some later time, and, therefore, give him a longer period (2). It would seem from the

(1) *Salter v. Cavanagh*, 1 Dru. & Walsh, 668; *Patrick v. Simpson*, 24 Q. B. D. 128

(2) *Thompson v. Simpson*, 1 Dru. & War. 459, 489; *Magdalen College, Oxford v. Att.-Gen.* 6 H. L. 189, 215; and see Part V. Ch. XVIII. and Lewin on Trusts, 9th ed. p. 998.

judgment in one case, that the conveyance spoken of in the 25th section takes place, not when the contract for the purchase is concluded and the estate transferred in equity, but when the legal conveyance is executed (1).

If a trustee on his own marriage settles the trust property for the benefit of himself and his wife and the issue of the marriage, it has been held that this is a conveyance for value within the meaning of the 25th section, and that the right of the *cestui que trust* will, at the end of twelve years from the time of the execution of the settlement, be barred as against all persons interested under it, even as against one who claims by devise an estate which the trustee by the settlement reserved to himself (2). This last position it was unnecessary to consider minutely in the case referred to, as the decision would have been the same on other grounds, and it is one which it seems hard to support, for by the concluding words of the 25th section, the right is to be taken as accruing at the time of the conveyance, only as against a purchaser for value and any person claiming through him, and it can hardly be said that a trustee who by a marriage settlement reserves an estate in the trust property to himself is a purchaser of such estate for valuable consideration, or a person claiming through such a purchaser.

Settlement
by a
trustee.

In a case which arose in Ireland, in which the *cestuis que trustent* filed a bill for an account of the rents of the trust property, the defendant, in order to prove a conveyance for value within the meaning of the 25th section, offered as evidence the memorial of a lost deed dated in 1831, the parties to which were H. (the trustee of the property in question) of the first part, X. and his daughter, A., "spinster," of the second part, and two trustees of the third part, whereby the lands in question were conveyed upon certain trusts which were not dis-

(1) *Att.-Gen. v. Flint*, 4 Hare, 147.

(2) *Petre v. Petre*, 1 Drew. 371, 397.

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closed in the memorial; it was proved that H. married A. in 1831, and till his death H., and afterwards the defendant, his son, had been continuously in undisputed possession and receipt of the rent for his own benefit. The Chancery Court of Appeal held that, while it might be inferred that the lost deed was a settlement on the marriage of H. and A., it could not be inferred that the defendant was a purchaser under it, so as to bring himself within the protection of sect. 25 (1).

*Knight v.
Bowyer.*

If one *cestui que trust* is in possession of a trust estate, or in receipt of the rents and profits, his possession is not adverse to the legal right of the trustees, and time will not run against their right or the right of another *cestui que trust* enforceable through them (2). In the case of *Knight v. Bowyer* just referred to, Sir George Bowyer had granted annuities to six persons, charged on his life interest in the estate of R., and he appointed Ballachy and Ralfe, his agents, to receive the rents of the estate, on trust to satisfy the annuities and pay the residue to Sir George or his assigns. The deed contained a covenant by Sir George not to revoke the powers therein contained, and provisions for the appointment of fresh receivers. By another deed, executed on the same day, Sir George appointed Bridger to be trustee of the estate, and conveyed it to him and his heirs during Sir George's life, upon trust to permit Sir George to receive the rents until default should be made in payment of the six annuities, or any annuities that might subsequently be charged on the estate, and thereupon to sell the hereditaments and apply the proceeds in paying the annuitants, and subject thereto in trust for Sir George and his assigns. Under these deeds Ballachy was put into possession of the rents as receiver. Afterwards Sir George granted three further annuities, and charged them on his life estate. He then executed a

(1) *Smith v. Smith*, 1 L. R. Ir. 206.

(2) *Knight v. Bowyer*, 2 De G. & J. 421; 27 L. J. Ch. 520.

deed, called the deed of direction, by which he directed Ballachy, Ralfe, and Bridger, the receivers and the trustee, to exercise the powers vested in them for the purpose of raising and paying the six earlier and also the three last created annuities. Notice of that deed was given immediately on its execution to the receivers and the trustee. Ballachy received the rents down to 1846, but the three later annuitants received nothing after 1814, the prior charges, &c., swallowing up the whole proceeds. It was held that the deed of direction operated to constitute the receivers and the trustee express trustees for the grantees of the three annuities, as assignees of Sir George. It was immaterial whether Bridger, the trustee, was ever in possession. "Assuming," said Turner, L.J., "that there was no possession by Bridger as trustee, there was the receipt of rents by Ballachy as a receiver clothed with a trust; and the estate vested in Bridger as trustee could not, as I conceive, be barred or extinguished whilst some of his *cestuis que trustent* were in receipt of the whole produce of the estate, and were in such receipt under a deed forming part of the same security."

The questions that arise as to charges on land have been treated as if the persons in whose favour the land is charged were themselves beneficial owners of the charges; but it is obvious that in many cases they may be merely trustees for others. Now, wherever there is a remedy in equity, it is clear on general principles that the Court always looks to the persons ultimately entitled, and that they have a remedy independently of any intermediate trustee. Consequently, when any conveyance for value takes place so as to set the statute running in these cases, time, so far as it is not extended by the 25th section, will begin to run against the parties ultimately entitled, having regard to the limitations under which they claim; but it must not be forgotten that under the 40th section of 3 & 4 Wm. IV. c. 27 (now the 8th section of 37 & 38 Vict. c. 57) time runs as

Charges
held in
trust for
others.

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soon as some person is capable of giving a receipt, and that consequently, if the person in whose favour the charge is made as trustee is capable of giving a receipt binding his *cestuis que trustent*, they may be barred without any regard to the time at which their own interests fall into possession (1).

Charities.

Charities were not bound by any Statute of Limitations before the statute 3 & 4 Wm. c. 27 (2); but after some judicial doubts (3), it is now settled that they are included within the provisions of that Act, and a mere gift direct to charities creates no express trust so as to bring them within the exception of the 25th section (4). However, land and money charged on land may be granted or devised in such a way as to create an express trust in favour of a charity. The 25th section then applies, as it does to other express trusts, and so long as the property is in the power of those persons on whom the duty is cast of dealing with it for the purposes of the charity, the rights of the parties entitled to the benefit of the charity are preserved from the effect of lapse of time.

If a trespasser, or a person who claims independently of the right of the charity, gets into possession, time will run against the title of the charity just as it would against any *cestui que trust* entitled under an express trust, if the trustees were out of possession, and the property held by a stranger (5). And if the trustees of charity property part with it to a purchaser for valuable consideration, then the right of the persons entitled to the benefit of the charity is deemed to accrue

(1) See *ante*, Part III. Ch. II. p. 188.

(2) See *Incorporated Society v. Richards*, 1 Dru. & War. 258, 287.

(3) *Incorporated Society v. Richards*, *ubi supra*; *Att.-Gen. v. Persee*, 2 Dru. & War. 67.

(4) *Commissioners of Charitable Donations v. Wybrants*, 7 Ir. Eq. R. 580; 2 Jo. & Lat. 182; *Magd. Coll. Oxford v. Att.-Gen.*, 6 H. L. C. 189.

(5) *President, &c., of Magdalen Hospital v. Knotts*, 8 Ch. D. 709; 4 App. Cas. 324.

for the purposes of the statute at the time of such conveyance, under the provisions of the 25th section, and will be barred at the end of twelve years from that time (1). And the right of the Attorney-General to file an information on their behalf is barred at the same time, for he has no right of action independent of the charity (2). The effect is the same if the conveyance be a lease reserving rent, and the rent has been regularly paid; the right to upset a lease under such circumstances being barred at the end of twelve years from the time it was granted (3). If a charity make a lease of land which is void *ab initio*, and the lessee enters and pays no rent, the title of the charity will be barred at the expiration of twelve years from the entry (4).

When trustees holding on express trusts for charities have fraudulently misapplied the funds, there is, as in the case of ordinary trustees holding on express trusts, no statutable limitation to their liability to account. Even before the Trustee Act, 1888, when the misapplication was made honestly but by mistake, an account was not usually directed beyond the filing of the information (5); in other cases there was no general rule to prevent the account being carried back to the date of the commencement of the misapplication, but owing to the great length of time over which the accounts in some cases would have otherwise had to be carried back, special circumstances and considerations of hardship to individuals and practical inconvenience frequently led

(1) *Commissioners of Charitable Donations v. Wybrants*, and *Magd. Coll. Oxford v. Att.-Gen.*, *ubi supra*; and see *Att.-Gen. v. Flint*, 4 Hare, 147.

(2) *Magd. Coll. Oxford v. Att.-Gen.*, *ubi supra*.

(3) *Att.-Gen. v. Davey*, 4 De G. & J. 136; *Att.-Gen. v. Payne*, 27 Beav. 168.

(4) *President and Governors of Magdalen Hospital v. Knotts*, 4 App. Cas. 324.

(5) *Att.-Gen. v. Corp. of Exeter*, 3 Russ. 395; *Att.-Gen. v. Dean of Ch. Ch.*, 2 Russ. 321; *Att.-Gen. v. Caius Coll.* 2 Keen, 150; *Att.-Gen. v. Drapers' Co.*, 4 Beav. 67; *Att.-Gen. v. Mayor of Newbury*, 3 M. & K. 647.

PART V. Courts of Equity to limit the account to some shorter
CH. XIX. period depending on the particular circumstances of each
— case (1).

(1) *Att.-Gen. v. Mayor of Exeter*, Jac. 448; 2 Russ. 362; *Att.-Gen. v. Brewer's Co.*, 1 Mer. 495; *Att.-Gen. v. Corp. of Stafford*, 1 Russ. 547; *Att.-Gen. v. Pretyman*, 4 Beav. 462; and see *Att.-Gen. v. Burgesses of E. Retford*, 2 M. & K. 35.

CHAPTER XX.

FRAUD AND ACQUIESCENCE (26TH & 27TH SECTIONS OF
3 & 4 WM. IV. C. 27).

THE 26th section of 3 & 4 Wm. IV. c. 27 provides as follows:—

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“In every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent of which he or any person through whom he claims may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall, or, with reasonable diligence, might have been first known or discovered: provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud against any *bonâ fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe that any such fraud had been committed.”

Fraud. 3 &
4 Wm. IV.
c. 27, s. 26.

The effect of this section is to preserve the power of a Court of Equity to grant relief as before in cases of concealed fraud, without giving a remedy against any parties who were not liable under the old law. The effect of the Supreme Court of Judicature Act, 1873 (1), sect. 24, subsect. 1, and of the “Supreme Court of Judicature Act (Ireland), 1877” (2), sect. 27, subsect. 1, would seem to

(1) 36 & 37 Vict. c. 66.

(2) 40 & 41 Vict. c. 57.

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What is
concealed
fraud?

be that all branches of the Supreme Court of Judicature both in England and Ireland can now give such relief.

By the concealed fraud spoken of is meant much the same sort of fraud as was a ground of relief before the passing of the Act 3 & 4 Wm. IV. c. 27. It does not mean the case of a person entering wrongfully into possession, but a case of designed fraud by which a person knowing to whom the right belongs conceals the circumstances giving that right, and by means of such concealment enables himself to enter and hold (1). A conveyance from a lunatic may be void or voidable, but the mere fact of possession of property having been obtained under a conveyance from a lunatic or person of infirm mind is not of itself sufficient to establish a case of fraud within this section (2). But such a fact is an element in the proof of fraud, and if the execution of a conveyance or devise be obtained from such a person in circumstances which show *mala fides* on the part of the grantee or devisee, this is a fraud within the meaning of the section (3). Where a person was designedly brought up as the second legitimate son, whereas he was in fact the eldest, it was held that such a course of action constituted a concealed fraud within the section (4).

Where an insolvent deliberately omitted an estate from his schedule, there being nothing to point out to the assignee that he had any other property besides what was stated, this was held to be a concealed fraud by which the assignee was deprived of the property (5).

When
fraud
might have
been dis-
covered.

A lunatic may, of course, bring himself within the exception of the statute provided specially in his favour, but in deciding at what time a person who has been defrauded

(1) *Petre v. Petre*, 1 Drew. 371, 397; *Rains v. Buxton*, 14 Ch. D. 537.

(2) *Price v. Berrington*, 3 McN. & G. 486; *Manby v. Bawicke*, 3 K. & J. 342.

(3) *Lewis v. Thomas*, 3 Hare, 26.

(4) *Vane v. Vane*, L. R. 8 Ch. 383.

(5) *Sturgis v. Morse*, 24 Beav. 541.

might, with reasonable diligence, have discovered the fraud and so first lose the protection of this section, the Court will not regard the capacity of such a person's mind to discover the fraud (1). To deprive a person of the benefit of the section it would seem not sufficient to show that he might have discovered the fraud by pursuing an inquiry in some collateral matter. It must be shown that there has been something to put him upon inquiry respecting the matter itself, which inquiry if made would have led to the discovery of the real facts (2). In *Chet- ham v. Hoare* (3) the plaintiff brought a bill in equity to recover property to which his predecessor had become entitled in 1769, and he alleged that the register containing the entry of a marriage which took place in 1724, and which was a necessary link in his title, had been mutilated for the sake of suppressing evidence, and that this fraud had not been discovered till 1868; Malins, V.-C., held that evidence of the marriage might, with reasonable diligence, have been obtained long before, and dismissed the bill (4). Malins, V.-C., expressed his opinion in this case that sect. 26 should receive the strictest interpretation (5).

The last clause of the section provides for the protection of a *bonâ fide* purchaser for value who had no reason to believe that a fraud had been committed. It is said that the same circumstances should be considered sufficient under this proviso to give a purchaser reason to believe that fraud had been committed, as would be held sufficient to enable the person defrauded to discover the fraud with reasonable diligence within the meaning of the earlier part of the section (6). It has been held that a purchaser

(1) *Manby v. Bewicke*, 3 K. & J. 342.

(2) *Sturgis v. Morse*, *ubi supra*.

(3) L. R. 9 Eq. 571; 39 L. J. Ch. 376.

(4) See *Lawrance v. Norreys*, 15 App. Cas. 210. *In re Jennens*. *Willis v. Earl Howe*, 50 L. J. Ch. 4; 29 W. R. 70; *Willis v. Earl Howe*, 41 W. R. 433.

(5) L. R. 9 Eq. at p. 577.

(6) *Sturgis v. Morse*, *ubi supra*.

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for value who, though himself ignorant of the fraud, contracts through an agent who knows of the fraud, cannot protect himself under the proviso to sect. 26 (1).

The 27th section of 3 & 4 Wm. IV. c. 27 provides that Courts of Equity shall have power to refuse relief before the lapse of the statutory period of limitation in all cases in which, on account of the plaintiff's acquiescence or on any other ground, it would be inequitable that such relief should be granted. That section is as follows:—

Acquies-
cence, &c.
3 & 4 Wm.
IV. c. 27,
s. 27.

“Provided always that nothing in this Act contained shall be deemed to interfere with any rule or jurisdiction of Courts of Equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of this Act.”

No new effect is given by this section to acquiescence, but the rules of equity on the subject are left as they were before. This section was only necessary to make it clear that the statutory limitations applicable to suits in equity were not intended to interfere with such rules. The doctrines of equity on this subject are discussed above (2), and it will be sufficient to say here, that by acquiescence is not meant simple laches or omission to prosecute a remedy. A person does not acquiesce in a wrong by merely delaying to enforce his right; but if he lies by with full knowledge of his rights, and tacitly allows conduct which is inconsistent with them, and thereby induces another person to incur expense and alter his position, or leads innocent persons to gain interests which would be prejudiced by the subsequent enforcement of his right, he will be precluded from questioning in equity acts which he has himself authorised by his conduct. Acquiescence imports knowledge, for a man cannot be said to acquiesce in that which he did not know; and in the case of a breach of trust especially there must be full knowledge, and a *cestui que trust* can-

(1) *Vane v. Vane*, L. R. 8 Ch. 383.

(2) See *ante*, Part IV. Ch. II. p. 263.

not be bound by acquiescence unless he has been fully informed of his rights, and of all the material facts and circumstances of the case (1).

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(1) See *ante*, Part IV. Ch. II. p. 266, *et seq.*; *Duke of Leeds v. Earl of Amherst*, 2 Phillips, 123; *Life Association of Scotland v. Siddal*, 3 De G. F. & J. 58, 74; 7 Jur. N. S. 787; *Bright v. Legerton*, 29 Beav. 60. See also *Browne v. Cross*, 14 Beav. 105, and *Rossiter v. Rossiter*, 14 Ir. Ch. R. 247; *De Bussche v. Alt*, 8 Ch. D. 286. *In re Cross. Harston v. Tenison*, 20 Ch. D. 109.

CHAPTER XXI.

LIMITATION OF TIME AS BETWEEN MORTGAGOR AND MORTGAGEE (7 WM. IV. & 1 VICT. C. 28, 37 & 38 VICT. C. 57, s. 7).

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Limitation
of mort-
gagee's
right of
entry.

THE right of a mortgagee to enter upon the mortgaged property or to bring an action for its recovery being a legal right such as is spoken of in the 2nd and 3rd sections of 3 & 4 Wm. IV. c. 27, a mortgagee would under those sections be barred twelve years after the right had accrued to himself or some one through whom he claims. It is clear, however, that a mortgagee, though in law the assignee of the entire legal estate, is really, and according to the intention of the parties, in a very different position. It is generally contemplated by both parties that the mortgagor shall remain in possession, and that the land shall only be a security for the payment of the principal and interest; and as long as such interest is paid to the mortgagee, he is guilty of no real laches in not entering on the estate, and hence in ordinary circumstances the possession of a mortgagor was not before the Act 3 & 4 Wm. IV, c. 27 considered adverse to the mortgagee (1).

Effect of
payment of
interest.

No special provision was made by the statute 3 & 4 Wm. IV. c. 27 for the case of a mortgagee out of possession, and in the case of *Doe d. Jones v. Williams* (2) doubts arose whether the payment of interest by the

(1) *Doe d. Jones v. Williams*, 5 A. & E. 291; Watkins' Conveyancing, 8th ed. p. 14.

(2) 5 A. & E. 291.

mortgagor would preserve the mortgagee's right from being barred without his entering on the land or obtaining a written acknowledgment of title. To remove these doubts, the Act 7 Wm. IV. and 1 Vict. c. 28 was passed, by which, as amended by 37 & 38 Vict. c. 57, it is enacted as follows:—

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“It shall and may be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the 1st section of the said Act” (*i.e.* 3 & 4 Wm. IV. c. 27), “to make an entry or bring an action at law, or suit in equity, to recover such land at any time within *twelve* years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than *twelve* years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, anything in the said Act notwithstanding.”

7 Wm. IV.
& 1 Vict.
c. 28.

It is clear that this section applies to foreclosure actions as well as to actions of ejectment, so that time will begin to run afresh in both cases from payment of interest due under the mortgage.

The payment of principal or interest must be by a person liable as mortgagor or by some person on his behalf. Receipt of rent from the tenant of the mortgaged property is not payment of interest or part payment of principal so as to take the case out of the statute (1). Payment by a person who under the terms of the mortgage-contract is entitled to make a payment and from whom the mortgagee is bound to accept a tender for the defeasance or redemption of the mortgage is a payment sufficient to prevent the statute from running in favour of the mortgagor (2).

The payment of principal or interest must also be made to a person entitled to receive it as mortgagee.

(1) *Harlock v. Ashberry*, 19 Ch. D. 539.

(2) *Lewin v. Wilson*, 11 App. Cas. 639.

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An administrator who is also one of the next of kin of the intestate has a right to appropriate to himself a part of the estate of the intestate without any agreement with the other next of kin and without any deed or writing ; where the administrator of an intestate mortgagee appropriated to himself the mortgage as his share of the estate without any such agreement or deed or writing, and during his life received the interest from the tenant for life of the equity of redemption, and after the administrator's death his personal representatives continued to receive the interest, it was held that the payments of interest to his personal representatives were made to the right persons so as to prevent the operation of the statute (1). In this case the payments to the administrator himself were on other grounds sufficient to prevent the operation of the statute, namely, as made to the personal representative of the deceased mortgagee.

Mortgages
of rent are
not within
7 Wm. IV.
& 1 Vict.
c. 28.

The beneficial saving of the Act 7 Wm. IV. and 1 Vict. c. 28 is confined to mortgages of "land," as defined by the 1st section of 3 & 4 Wm. IV. c. 27, that is, to mortgages of corporeal hereditaments and of tithes in the hands of any person except spiritual and eleemosynary corporations sole. The object of this restriction is not clear ; rent-charges may be, and sometimes are, the subject of mortgage, and it is hard to point out any reason why mortgagees of land or tithes should by receiving interest retain their right to bring an action to recover such land or tithes, and why, on the other hand, the mortgagee of a rent-charge should not by receiving interest retain his right to recover the rent-charge by distress.

The Act 7 Wm. IV. and 1 Vict. c. 28 does not in words take away from the mortgagee of a rent-charge any saving of his rights, which payment of interest might have effected under 3 & 4 Wm. IV. c. 27 ; but, as

(1) *Barclay v. Owen*, 60 L. T. 220.

mortgages of rent are clearly not included in the provisions of 7 Wm. IV. and 1 Vict. c. 28, and there is no section in 3 & 4 Wm. IV. c. 27 which gives to the receipt of interest the effect of preserving the mortgagee's right, it may be considered pretty clear that receipt of interest on a debt secured by a mortgage of rent-charge will not have the effect of keeping alive the mortgagee's right to distrain for the rent-charge on the land out of which it issues.

In some circumstances a mortgagor in possession is considered to be in law tenant at will to the mortgagee (1), and in such a case it would seem that time cannot run against the right of the mortgagee until the tenancy at will has been properly determined, as the 7th section of 3 & 4 Wm. IV. c. 27 does not apply to such a case (2), and at common law the mortgagee could not bring ejectment without first having determined the tenancy. But the proviso to sect. 7 of 3 & 4 Wm. IV. c. 27 that a mortgagor is not to be deemed a tenant at will within the meaning of that clause to his mortgagee does not apply when the mortgagor has paid the mortgage debt and is in possession of the property but without a reconveyance having been made to him; in such a case, on payment of the mortgage debt, the mortgagor becomes tenant at will to the mortgagee within the meaning of the 7th section, and the mortgagor's title to the legal estate will be extinguished in thirteen years from the payment (3).

If, at the time of making the mortgage, the mortgagor himself is in possession of the mortgaged property, and there be a provision in the mortgage deed for quiet possession by the mortgagor until default upon a certain day, and the mortgage deed be executed by the mortgagee, it operates as a redemise by the mortgagee

When the right accrues to the mortgagee.

(1) Watkins' Conveyancing, 8th ed. p. 13.

(2) See *ante*, Part V. Ch. VIII. p. 341.

(3) *Sands to Thompson*, 22 Ch. D. 614.

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until the day named, and till then ejectment will not lie, and time therefore will not begin to run till that day (1). If, however, there is no such provision, or if the deed is not executed by the mortgagee, the right of the mortgagee accrues immediately upon the execution of the mortgage, and this will be so even though the mortgage contain a covenant that it shall be lawful for the mortgagee to enter after default made, for this does not amount to a redemise until default (2).

Order of
fore-
closure.

An order of foreclosure absolute obtained by a legal mortgagee vests the ownership and the beneficial title to the land in him for the first time and a fresh right accrues to him at the date of the order, and an action brought to recover the land within twelve years of the order is not barred, although more than twelve years have elapsed since the legal estate was conveyed to the mortgagee and since the last payment of principal or interest secured by the mortgage (3).

If the mortgagor be himself out of possession at the date of the mortgage, whether the property be in the occupation of a tenant or of some one holding without a title, it would seem clear that the period of limitation must, as against the mortgagee, be calculated from the time at which, if no mortgage had been executed, the statute would begin to run against the title of the mortgagor, or those through whom he claims; that is, from the time at which, according to the 3rd and following sections of 3 & 4 Wm. IV. c. 27, the right of entry or action is in the circumstances of each case deemed to have first accrued. It is, however, settled that the effect of 7 Wm. IV. and 1 Vict. c. 28 is that payment of interest on the mortgage debt sets time running afresh in favour

(1) *Wilkinson v. Hall*, 3 Bingh. N. C. 508; *Doe d. Roylance v. Lightfoot*, 8 M. & W. 553, 564; and cases collected, Cole on Ejectment, 463 *et seq.*

(2) *Doe d. Roylance v. Lightfoot*, *ubi supra*.

(3) *Heath v. Pugh*, 6 Q. B. D. 345; 7 App. Cas. 235.

of the right of all persons claiming under the mortgage, not only as against the mortgagor who pays the interest, but also as against all persons in possession, even though the possession has been such that they would, by means of the statute, have acquired a good title against the mortgagor (1). This, however, would of course not be the case if before the making of the mortgage the period of limitation had run out against the mortgagor, for, his title being extinguished by the 34th section of 3 & 4 Wm. IV. c. 27, nothing would pass to the mortgagee by the mortgage, and payment of interest on the debt secured by such mortgage could not revive an extinct title (2).

In the case of a mortgage of a reversionary interest time does not begin to run against the right of the mortgagee to bring a foreclosure action until the interest falls into possession (3).

The Act 7 Wm. IV. and 1 Vict. c. 28 preserves the right of entry as if the Act 3 & 4 Wm. IV. c. 27 had never passed, but it does not give to a mortgagee a right of entry where, before the passing of the last-mentioned Act, that right had been taken away by adverse possession under the old law (4).

A person who paid off a mortgage debt and took at once a conveyance of the legal estate in the mortgaged property from the mortgagee and of the equity of redemption from the mortgagor was held to be a person claiming under a mortgage of land within the meaning

What persons claim under a mortgage.

(1) *Doe d. Palmer v. Eyre*, 17 Q. B. 366; 20 L. J. Q. B. 431; *Ford v. Ager*, 2 H. & C. 279; 32 L. J. Exch. 269; 8 L. T. N. S. 546; *Doe d. Baddeley v. Massey*, 17 Q. B. 373; 20 L. J. Q. B. 434; *Eyre v. Walsh*, 10 Ir. C. L. R. 346.

(2) See judgment of Lord Campbell in *Doe d. Palmer v. Eyre*, 17 Q. B. 372; 20 L. J. Q. B. 434; *Hemming v. Blanton*, 42 L. J. C. P. 158.

(3) *Hugill v. Wilkinson*, 38 Ch. D. 480; *In re Lake's Trusts*, 63 L. T. 416. *In re Conlan's Estate*, 29 L. R. Ir. 199. *In re Hancock. Hancock v. Berrey*, 59 L. T. 197.

(4) *Eyre v. Walsh*, *ubi supra*.

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CH. XXI.
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How far
payment
of interest
affects a
stranger in
possession.

of the Act 7 Wm. IV. and 1 Vict. c. 28 (1). It seems clear that such a person claims under a mortgage to the extent of the interest which he has purchased from the mortgagee, but it is not clear that his claim stands on the same footing with regard to that interest which he purchased or affected to purchase from the mortgagor.

A mortgage may often represent but a very small portion of the value of the property; therefore, if a stranger has been in possession for twelve years, but interest has been meanwhile paid to the mortgagee, an important question may arise to what extent the Act 7 Wm. IV. and 1 Vict. c. 28 preserves to the mortgagee any right against the person in possession. In such a case the person in possession has gained a complete title to the land, subject only to the saving of the Act 7 Wm. IV. and 1 Vict. c. 28; the right saved by that Act is "the right of the mortgagee to make an entry or bring an action to recover the land," that is, to recover the whole legal estate subject to the right in equity of any other person interested in the property to pay off the mortgage and discharge the mortgagee's claim. It has, we believe, never been decided whether a person who claims a title by long possession has such a right to redeem, but, if he has, then any one who purchases from the mortgagee, as in *Doe d. Baddeley v. Massey* (2), would only gain a title to the mortgagee's interest. In support of this view it may be urged that the intention of the Act 7 Wm. IV. and 1 Vict. c. 28 was only to preserve the rights of mortgagees; therefore, if the title of a person who has had undisputed possession of land for twelve years is affected by the operation of that Act to any greater extent than is necessary for carrying out the intention of the Act, it is so far defeating the intention

(1) *Doe d. Baddeley v. Massey*, 17 Q. B. 378; 20 L. J. Q. B. 434. See also *Ford v. Ager*, 2 H. & C. 279; 32 L. J. Exch. 269; 8 L. T. N. S. 546.

(2) 17 Q. B. 378; 20 L. J. Q. B. 434.

of the Act 3 & 4 Wm. IV. c. 27, to which the Act 7 Wm. IV. and 1 Vict. c. 28 is only subsidiary.

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Where a person buys from a mortgagee who exercises a power of sale, the case is somewhat different. In such a case the purchaser takes the whole interest, legal and equitable, under the mortgage; and, as he does not claim through the mortgagor who has been dispossessed, there is not the same reason as in the case before put, why the person who has dispossessed the mortgagor should have a title to a part of the property as against the purchaser.

Another similar question is, how far can a mortgagor who exercises his right to redeem be said to claim under a mortgage and so to regain a title to the property of which he has been long dispossessed. It seems that for the reasons above given, he would have a title co-extensive with the mortgagee's interest, but no other claim to the property.

Mortgagor
redeeming
the pro-
perty.

In the case of *Ford v. Ager* (1) the writ in ejectment was issued in 1863. The claimant relied on more than twenty years' possession, commencing in 1836. The defendant claimed through a mortgagee to whom the property had been mortgaged in 1837 and to whom interest had been paid up till 1848. It was held that the defendant's right was kept alive. The case was clearly within the provisions of 7 Wm. IV. and 1 Vict. c. 28, although that Act was not referred to.

Ford v.
Ager.

If the equity of redemption in mortgaged property come into the hands of different owners, a part payment or payment of interest within 7 Wm. IV. and 1 Vict. c. 28, by the owner of part of the property will set time running afresh not only against that part of the property, but also against all the property originally mortgaged (2).

Where A. and B. gave separate mortgages of two properties as a security for the same debt, A. being the

(1) 2 H. & C. 279; 32 L. J. Exch. 269; 8 L. T. N. S. 546.

(2) *Chinnery v. Evans*, 11 H. L. C. 115, 133.

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principal debtor and B. a surety, and each mortgage contained a proviso for defeasance on the payment of the debt by A. or B., it was held by the Privy Council that the payment of interest by A. prevented the statute running in respect of the property mortgaged by B. (1); the case was decided under the statutes of New Brunswick which contain provisions analogous to 7 Wm. IV. and 1 Vict. c. 28.

Payment
of interest
after lapse
of twelve
years.

If a mortgagee were to omit for twelve years to receive payment of interest, then, the period during which his right is saved by 7 Wm. IV. and 1 Vict. c. 28, having run out, his right would be taken away by the 1st section of 37 & 38 Vict. c. 57 (formerly the 2nd section of 3 & 4 Wm. IV. c. 27), and his title would therefore be extinguished by the 34th section of 3 & 4 Wm. IV. c. 27, and could not be revived by any subsequent payment of principal or interest or by any acknowledgment by the mortgagor of the existence of the mortgage, except in so far as such an acknowledgment, if made by deed, might operate as an estoppel (2).

Limitation
of redemp-
tion
actions.

The period within which a mortgagor must bring a redemption action against a mortgagee in possession is limited by the 7th section of 37 & 38 Vict. c. 57 (which has been substituted for the 28th section of 3 & 4 Wm. IV. c. 27); the general effect of that section is that independent enjoyment by a mortgagee for twelve years will be a bar, as in the case of any occupant holding without title.

The section is as follows :—

7th section
of 37 & 38
Vict. c. 57.

“ When a mortgagee shall have obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor or any person claiming through him shall not bring any action or suit to redeem the mortgage but within twelve years

(1) *Lewin v. Wilson*, 11 App. Cas. 639.

(2) *Hemming v. Blanton*, 42 L. J. C. P. 158; *Gregson v. Hindley*, 10 Jur. 383.

next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor or of his right to redemption shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee or the person claiming through him; and in such case no such action or suit shall be brought but within twelve years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage-money or land or rent, by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment, shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage-money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the

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—

land or rent, on payment, with interest, of the part of the mortgage-money, which shall bear the same proportion to the whole of the mortgage-money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.”

The word rent in this section, as in most places throughout the Acts 3 & 4 Wm. IV. c. 27 and 37 & 38 Vict. c. 57, where the word is used, means rent-charge.

The words “possession or receipt of profits” in this section would seem to include the receipt by a mortgagee of rent from a tenant in possession; receipt of such rent by a mortgagee for twelve years will, it seems, bar the mortgagor’s right to redeem (1).

Under the words of the 7th section of 37 & 38 Vict. c. 57 (formerly the 28th section of 3 & 4 Wm. IV. c. 27), when the mortgagee goes into possession, the statute runs against the mortgagor and all persons claiming through him; and, therefore, if an equity of redemption be settled and after the settlement takes effect, the mortgagee goes into possession, all persons claiming under the settlement will be barred of their right to redeem in twelve years from that period, regardless of the times at which their several estates take effect in possession (2).

In a case (3) which arose under 3 & 4 Wm. IV. c. 27, and where the original contract was in terms that the mortgagor might redeem at any time during a period extending beyond the twenty years, it was said that the 28th section of 3 & 4 Wm. c. 27 (corresponding to the 7th section of 37 & 38 Vict. c. 57) would probably not bar the mortgagor’s title in twenty years after the mortgagee’s possession commenced.

Mortgagee
having life
estate in
equity of
redemption.

If the tenant for life of an estate pay off a charge on

(1) See *Ward v. Carttar*, L. R. 1 Eq. 29; *Markwick v. Hardingham*, 15 Ch. D. 339.

(2) *Browne v. Bishop of Cork*, 1 Dru. & Walsh, 700.

(3) *Per Cranworth, L.C. Alderson v. White*, 2 De G. & J. 109.

the estate, he is, in the absence of evidence of an intention to put an end to the charge, entitled to the charge for his own benefit. And, although twenty (now twelve) years elapse before his death without anything being paid on account of the charge or any acknowledgment being given, his representatives are entitled to the charge after his death as against the remaindermen (1). So, if a mortgagee in possession purchases a life estate in the equity of redemption, time will not run during the continuance of the life estate against those entitled in remainder to the equity of redemption (2). In the case of *Hyde v. Dallaway* (2), a mortgagee, having been in possession for six years without making any acknowledgment of the mortgagor's title, afterwards purchased the interest of the tenant for life of the equity of redemption and continued in possession for twenty years longer; Wigram, V.-C., said :—"The possession of the mortgagee appears to me in point of fact not to have been adverse. The 28th section (*i.e.* of 3 & 4 Wm. IV. c. 27) supposes the existence of a person to whom acknowledgment is to be made, as well as that of the party to make it; there must be not only a party to redeem, but one to be redeemed. The parties in this case were not, I think, in the situation which the statute contemplates as creating a bar."

If a mortgage be made by conveyance to a trustee in trust to sell and hold the purchase-money and the rents of the unsold portion of the estate in trust to pay to the mortgagee the principal of the mortgage debt and interest and to hand over the surplus to the mortgagor, and the mortgagee goes into possession, his possession is not to be considered as the possession of a trustee, and the right

Mortgage
in form of
a trust for
sale.

(1) *Burrell v. Lord Egremont*, 7 Beav. 205; *Lord Carbery v. Preston*, 13 Ir. Eq. R. 455; *Baldwin v. Baldwin*, 4 Ir. Ch. R. 501. And see *Lord Kensington v. Bouverie*, 7 De G. M. & G. 144; *Clarke v. Bodkin*, 13 Ir. Eq. R. 492.

(2) *Hyde v. Dallaway*, 2 Hare, 528; Sugd. Prop. Stat. p. 115. And see *Raffety v. King*, 1 Keen, 601.

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of the mortgagor to an account and redemption is not a right within the 25th section of 3 & 4 Wm. IV. c. 27, but is within the 7th section of 37 & 38 Vict. c. 57 (formerly the 28th section of 3 & 4 Wm. IV. c. 27), and will be barred after the lapse of twelve years (1). And in such a case, when the mortgagor's right of redemption is barred, the trust for the surplus money is also extinguished (2).

Where a solicitor, to facilitate a transaction in which he was employed, himself paid off the mortgage debt of a client, and then entered into the receipt of the rents of the property, it was held that he must be treated as having paid the money and received the rents as agent of his client, and time, therefore, did not run in his favour as mortgagee in possession (3).

Effect of
acknow-
ledgment.

A mortgagor is debarred from bringing a suit to redeem after the expiration of twelve years from the time when the mortgagee entered into possession, unless in the meantime an acknowledgment has been given. Therefore, by the 34th section of 3 & 4 Wm. IV. c. 27, the right and title of the mortgagor to the land or rent for the recovery of which a redemption action might have been brought within twelve years, is extinguished at the expiration of that period. At the end of the period of twelve years, the mortgagee has a perfect title to the property, and the mortgagor is an entire stranger to it, and no subsequent acknowledgment or payment can divest the title of the person who was formerly mortgagee, and transfer it to the person who was formerly mortgagor. This has been decided by the Court of Appeal in *Sanders v. Sanders* (4), and the case of *Stansfield v. Hobson* (5), where the opposite view was not ex-

(1) *Locking v. Parker*, L. R. 8 Ch. 30; 41 L. J. Ch. 544. *In re Alison. Johnson v. Mounsey*, 11 Ch. D. 284.

(2) *Chapman v. Corpe*, 41 L. T. 22.

(3) *Ward v. Carttar*, L. R. 1 Eq. 29.

(4) 19 Ch. D. 373; 51 L. J. Ch. 276.

(5) 16 Beav. 236; 3 De G. M. & G. 620; 22 L. J. Ch. 657.

pressed but was taken for granted in the decision, cannot now be regarded as an authority to the contrary. Under the old law, a mortgagee who had been in possession for more than twenty years without making any acknowledgment of the mortgagor's title, held the property discharged of the mortgagor's right to redeem, but by a subsequent acknowledgment the equity of redemption could be revived (1).

An acknowledgment in order to keep alive the mortgagor's right to redeem must be signed by the mortgagee or other person who has obtained possession claiming through him and must be given to the mortgagor or his agent. An acknowledgment given to a third person is of no avail. Thus, where a mortgagee's representatives entered into possession in 1822, and afterwards assigned the mortgage debt and the mortgaged property to a third person by a deed which recited the mortgage and also recited that the equity of redemption had not been barred, and which conveyed the mortgaged property expressly subject to the equity of redemption, it was held in a redemption suit commenced by the mortgagor's heir in 1843, that there was not a sufficient acknowledgment in the deed to make the mortgaged property redeemable (2). And where a mortgagee made an acknowledgment to the mortgagor after the latter had become bankrupt, it was held that, as the mortgagor's estate ceased on his becoming bankrupt, the acknowledgment could not operate to take the case out of the statute (3). But in order to make a third person, to whom an acknowledgment is made, the agent of the person entitled, it is not necessary that such third person should have actual authority to act as agent; it is sufficient that he has acted as agent, and been treated as such by the person making the acknowledgment (4).

Acknowledgment
to a third
party.

(1) *Pendleton v. Rooth*, 1 De G. F. & J. 81, and 29 L. J. Ch. 265.

(2) *Lucas v. Dennison*, 13 Sim. 584.

(3) *Markwick v. Hardingham*, 15 Ch. D. 339.

(4) *Trulock v. Robey*, 12 Sim. 402.

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Acknowledgment
by one of
two joint mort-
gagees.

In *Richardson v. Younge* (1), it was held by Malins, V.-C., and on appeal by Mellish and James, L.JJ., that an acknowledgment by one of two joint mortgagees, who were shown by the deed to be trustees, had no effect at all on the operation of the statute, either as against the whole property or as against a moiety of it; Mellish, L.J., expressed an opinion that the part of sect. 28 of 3 & 4 Wm. IV. c. 27 (now sect. 7 of 37 & 38 Vict. c. 57), which relates to an acknowledgment when there are more mortgagees than one, applies only to cases where there are divided interests.

Accounts
kept by
mortgagee
in posses-
sion.

In the case of *Baker v. Wetton* (2), in which the bill alleged that the mortgagee had kept accounts of the rents received by him, and had otherwise treated and considered himself as mortgagee, a question was raised, but not decided, whether the bar created by twenty years' possession (under 3 & 4 Wm. IV. c. 27) was thereby defeated. This is a question of some importance, and not unlikely to arise again. Lord St. Leonards remarks that such a keeping of accounts by a mortgagee could hardly be held to supply the want of an acknowledgment. "When the right to redeem is barred, no one has a right to inquire how the owner, though formerly a mortgagee, has kept his accounts. The statute intended to put an end to such inquiries" (3). It would seem that where the mortgagee has entered into possession, accounts of his receipts of rent can only be used as an acknowledgment if signed by him, and kept not for his own use but for that of the mortgagor, as accounts kept for the mortgagee's own private use are in no sense an acknowledgment given by him to the mortgagor or his agent (4).

(1) L. R. 10 Eq. 275; 6 Ch. 478; 39 L. J. Ch. 475; 40 L. J. Ch. 338.

(2) 14 Sim. 426.

(3) Prop. Stat. p. 117.

(4) See *In re Alison*. *Johnson v. Mounsey*, 11 Ch. D. 284.

No particular form of acknowledgment would seem to be required any more than in the case of an acknowledgment within the 14th section of 3 & 4 Wm. IV. c. 27, but any expression in writing from which there may fairly be implied an admission of the right to redeem in the party to whom the expression is communicated, would seem sufficient (1). And in judging whether a document is a sufficient acknowledgment, the Court will look at the circumstances in which it was written, and will construe it in the way in which the writer intended it to be construed by the person to whom it was addressed (2).

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What
acknow-
ledgment
sufficient.

It was decided under the 28th section of 3 & 4 Wm. IV. c. 27, that that section was so far retrospective as to apply to cases where the mortgagee was in possession when the Act passed, and took away from the mortgagor the benefit of acknowledgments made before the passing of the Act, though within twenty years of action brought, if they were not such acknowledgments as to meet the requirements of the 28th section (3). In the case of *Batchelor v. Middleton* (3) just referred to, the mortgagee had entered into possession in 1816, and the mortgaged property had been assigned in 1827, and again in 1828 by the transferee, the deeds of assignment in each case acknowledging the existence of the equity of redemption. The Act 3 & 4 Wm. IV. c. 27 came into operation on the 31st of December, 1833. It was held that the mortgagor who filed his bill in 1845 was barred of his right to redeem.

The 28th
section of
3 & 4 Wm.
IV. c. 27
retrospec-
tive.

It should be observed that neither in the 28th section of 3 & 4 Wm. IV. c. 27, nor in the 7th section of 37 & 38 Vict. c. 57, which has now been substituted for it, is

Disability
of mort-
gagor.

(1) See *Stansfield v. Hobson*, 3 De G. M. & G. 620; 22 L. J. Ch. 657; *Thompson v. Bowyer*, 9 Jur. N. S. 863.

(2) *Per Shadwell, V.-C., Trulock v. Robey*, 12 Sim. p. 406.

(3) *Batchelor v. Middleton*, 6 Hare, 75. See *Towler v. Chatterton*, 6 Bingh. 258.

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there any saving provided for disability on the part of the mortgagor or his heirs in regard to the bar created by those sections; and the provisions of the 16th section of 3 & 4 Wm. IV. c. 27 (now the 3rd section of 37 & 38 Vict. c. 57) do not apply to such a case (1).

(1) *Kinsman v. Rouse*, 17 Ch. D. 104; *Forster v. Patterson*, 17 Ch. D. 132.

CHAPTER XXII.

SUMMARY OF THE DIFFERENT STATUTES OF LIMITATION
AFFECTING THE RIGHTS OF MORTGAGORS AND
MORTGAGEES.

IN the foregoing pages there have been discussions on so many enactments providing limitations of time with respect to the various rights of mortgagors and mortgagees, that it may be useful to bring together and recapitulate the principal provisions by which the limitations of the different rights and remedies of those parties are governed.

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The time within which the principal of the mortgage debt can be recovered out of the land is limited by 37 & 38 Vict. c. 57, s. 8, to twelve years (formerly twenty under 3 & 4 Wm. IV. c. 27). The time for recovering from a mortgagor a mortgage debt secured by a bond or covenant is, according to recent decisions, limited also now to twelve years (1).

Recovery
of principal
of mort-
gage debt.

The 42nd section of 3 & 4 Wm. IV. c. 27 provides a limitation for the recovery of arrears of interest on a debt charged upon land; and the period allowed for its recovery by that section is six years, unless a prior incumbrancer has been in possession of the mortgaged land within a year before action, in which case all arrears of interest may be recovered which have become due during the possession of such incumbrancer. This enactment extends to all the mortgagor's remedies for the

Recovery
of interest.

(1) *Sutton v. Sutton*, 22 Ch. D. 511; *Fearnside v. Flint*, 22 Ch. D. 579; *In re Frisby*, *Allison v. Frisby*, 43 Ch. D. 106.

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recovery of arrears of interest on a mortgage debt, including a foreclosure action, unless there is a covenant or bond by which the mortgagor is expressly bound to pay interest on the debt; and in that case the remedy for the recovery of the interest by action is according to the authorities excepted out of the 42nd section of 3 & 4 Wm. IV. c. 27, and is within the 8th section of 37 & 38 Vict. c. 57, and accordingly the mortgagee, though he can recover only six years' arrears out of the land, can recover twelve years' arrears by the personal remedy of an action on the bond or covenant against the mortgagor. Where the covenant for payment only extends to the principal, the interest recoverable even in an action on the covenant is, it seems, limited to six years' arrears (1).

Arrears of
interest in
redemption
actions.

It is a somewhat doubtful question whether a mortgagor in order to redeem is bound to pay more than six years' arrears of interest, but the better opinion seems to be that the rights of the parties in foreclosure and redemption actions are the same, and that a mortgagor is entitled to redeem on payment of six years' arrears only (2). In an action for the redemption of a mortgage of a reversionary interest in personalty, there seems no statutory limit for the recovery of arrears of interest (3).

Right to
tack
arrears.

It seems that where there is in a mortgage deed a covenant to pay, and a redemption action is instituted by the mortgagor's heirs, the mortgagee will be allowed to tack the difference between the six and twelve years' arrears of interest to the mortgage debt as a specialty debt, subject of course to all the ordinary incidents of tacking independent specialty debts to mortgage debts, and therefore without prejudice to mesne incumbrancers (4). A mortgagee would probably, though this is not

(1) See Part III. Ch. IV. p. 200.

(2) See *ante*, Part III. Ch. IV. p. 204, *et seq.*

(3) *Mellersh v. Brown*, 45 Ch. D. 225.

(4) Part III. Ch. IV. p. 210.

so clear, be allowed to do this in a foreclosure action instituted by him against the mortgagor's heirs (1). It would seem, however, that in both cases the question of tacking ought to be actually raised on the pleadings (2).

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A mortgagee who exercises a power of sale and has in his hands the proceeds, is entitled to deduct from the money in his hands the principal and all arrears of interest due, but whenever a mortgagee has to resort to an action in order to recover arrears of interest due, he cannot recover more than six years' arrears; but a petition by the mortgagee for the payment out of court of the proceeds of the sale which have been paid into court, is not such a proceeding as to limit the mortgagee to six years' arrears (3).

Sale under
power of
sale.

Although a foreclosure suit is clearly within sect. 42 of 3 & 4 Wm. IV. c. 27 (4), it is also a suit to recover land within the 24th section of that Act (5), and the period of limitation is twelve years; time, except in the case of mortgages of rent-charges, would be set running afresh by part payment of principal or payment of interest, in consequence of the provisions of 7 Wm. IV. and 1 Vict. c. 28 (6).

Fore-
closure
actions.

The mortgagee's right to enter on mortgaged land is a legal right within the meaning of the 1st section of 37 & 38 Vict. c. 57 (formerly the 2nd section of 3 & 4 Wm. IV. c. 27), and will, accordingly, like any other legal right to land, be barred at the end of twelve years after the right accrued to the mortgagee himself, or some one through whom he claims, subject only to the effect of part pay-

(1) See *ante*, Part III. Ch. IV. p. 210. See also *Watts v. Symes*, 1 De G. M. & G. 240; and *Selby v. Pomfret*, 1 John. & Hem. 336; on appeal, 7 Jur. N. S. 835.

(2) See *ante*, Part III. Ch. IV. p. 211.

(3) See *ante*, Part III. Ch. IV. p. 209.

(4) Part III. Ch. IV. p. 195.

(5) Part III. Ch. I. p. 164.

(6) Part V. Ch. XXI. p. 455.

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Effect of
acknow-
ledgments,
payments
and dis-
abilities on
the rights
of mort-
gagees.

ment of principal or payment of interest, under the provisions of 7 Wm. IV. and 1 Vict. c. 28 (1).

The Acts 3 & 4 Wm. IV. c. 27, 3 & 4 Wm. IV. c. 42, and 37 & 38 Vict. c. 57, which provide limitations applicable to the recovery of the principal and interest of mortgage debts, are all qualified by provisions for the enlargement of the term of limitation when a written acknowledgment of the debt has been given; and 3 & 4 Wm. IV. c. 42, s. 5, and 37 & 38 Vict. c. 57, s. 8, give a like effect to a part payment of principal or interest. The enactments which provide limitations for the recovery of land are also qualified by provisions for the enlargement of the time of limitation by a written acknowledgment, and also by part payment of, or payment of interest on the mortgage debt. It does not, however, follow that an acknowledgment or part payment, which is sufficient to take a case out of one enactment, is sufficient to satisfy the provisions of another. The sufficiency of any such acknowledgment or payment must, it is clear, be considered with reference to the requirements of the particular enactment, the effect of which it is desired to avoid. And the effect of the existence of any disability on the different rights of a mortgagee must be decided in the same way. Hence it may be worth while to point out how the different rights of mortgagees are affected by the principal provisions with respect to acknowledgments and payments contained in the different enactments applicable to the various remedies for the recovery, not only of the money, but the land, and also the principal provisions with regard to disabilities applicable in the different cases. And from this it will be seen that there may be many states of circumstances under which some or one of the remedies of a mortgagee may be barred, while others are not.

Acknow-
ledgments
or pay-
ments.

First, with regard to acknowledgments and payments on account of principal or interest.

(1) See *ante*, Part V. Ch. XXI. p. 455.

In actions governed by 3 & 4 Wm. IV. c. 42, s. 3, acknowledgments in writing must be signed by the mortgagor or his agent, but need not be made to the mortgagee; they are sufficient if made to a third party (1).

In actions governed by 37 & 38 Vict. c. 57, s. 8, and 3 & 4 Wm. IV. c. 27, s. 42, the acknowledgment must be signed by the mortgagor and his agent, and made to the mortgagee or his agent (2).

In actions to recover the land governed by 37 & 38 Vict. c. 57, s. 1, and 3 & 4 Wm. IV. c. 27, s. 24, an acknowledgment of title must be signed by the mortgagor in possession himself (*not by his agent*), and made to the mortgagee, or his agent (3).

An acknowledgment made after the commencement of an action governed by 3 & 4 Wm. IV. c. 42, s. 3, or 37 & 38 Vict. c. 57, s. 8, is of no avail; but in actions governed by 3 & 4 Wm. IV. c. 27, s. 42, an acknowledgment made after the commencement of action has the same effect as if made before (4).

In actions governed by 3 & 4 Wm. IV. c. 42, s. 3, an acknowledgment or part payment, or payment of interest by one of several parties liable on the specialty, binds all parties liable, including, when the mortgagor is dead, all persons interested in his real estate (5).

In actions governed by 37 & 38 Vict. c. 57, s. 8, an acknowledgment or part payment, or payment of interest by a person entitled to the equity of redemption of part of the land mortgaged, binds every person entitled to the equity of redemption in any other part of the land included in the mortgage; but it is not so clear whether the same principle holds good where different persons have different interests in the equity of redemption in the same land, or

(1) See *ante*, Part II. Ch. IV. p. 156, *et seq.*

(2) See *ante*, Part III. Ch. V. p. 221, *et seq.*

(3) See *ante*, Part V. Ch. XIII. pp. 380, 382, *et seq.*

(4) See *ante*, Part II. Ch. IV. p. 153, and Part III. Ch. V. p. 220.

(5) See *ante*, Part II. Ch. IV. p. 158.

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applies at all to acknowledgments in actions or suits governed by 3 & 4 Wm. IV. c. 27, s. 42.

In actions and suits to recover the land within 37 & 38 Vict. c. 57, s. 1, and 3 & 4 Wm. IV. c. 27, s. 24, an acknowledgment by a mortgagor affects only the lands in his possession, but by virtue of 7 Wm. IV. and 1 Vict. c. 28, part payment, or payment of interest by a person entitled to the equity of redemption of part of the land mortgaged, binds the persons entitled to the equity of redemption in all the rest of the land included in the mortgage (1).

The benefit of the Act 7 Wm. IV. and 1 Vict. c. 28, is confined to mortgagees of land as defined by the 1st section of 3 & 4 Wm. IV. c. 27, and does not, therefore, extend to mortgagees of rent-charge (2). And the part payment of principal, or payment of interest, has, under the statute 7 Wm. IV. and 1 Vict. c. 28, the effect of keeping alive the right under the mortgage, not only as against the mortgagor who makes the payment, but also as against a person who has possession of the land adversely both to mortgagor and mortgagee. It seems doubtful to what extent such payment can prejudice the title of a person who, but for it, would have gained a complete title to the land under the statute; that is to say, whether the mortgage is only kept alive as an encumbrance on such person's estate, or whether the mortgagee has a right to oust such a person entirely from that estate, and so not only to preserve the mortgagee's title, but also to revest the mortgagor's. It is, however, clear that payment of principal or interest, to have any effect at all under the statute of 7 Wm. IV. and 1 Vict. c. 28, must be made before any person has gained a complete title, as against both the mortgagor and mortgagee by possession, under 3 & 4 Wm. IV. c. 27 (3).

(1) See *ante*, Part V. Ch. XIII. p. 289.

(2) See *ante*, Part V. Ch. XXI. p. 456.

(3) See *ante*, Part V. Ch. XXI. p. 458, *et seq.*

Secondly, as to disabilities.

In actions governed by 3 & 4 Wm. IV. c. 42, s. 3, allowance is made for infancy, coverture, unsoundness of mind, and absence of the defendant beyond seas, and time does not run till the disability ceases (1). Coverture, since the Married Women's Property Act, 1882, is no longer a disability.

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Dis-
abilities.

In actions governed by 37 & 38 Vict. c. 57, s. 8, no actual provision is made for any disabilities, but as time does not begin to run until there is some person capable of giving a discharge, provision is practically made for infancy and unsoundness of mind, but none is made for the absence of the defendant beyond seas, and none for coverture. So far as an allowance is made, twelve years is given from the cesser of the disability (2).

In actions governed by 3 & 4 Wm. IV. c. 27, s. 42, no provision is made for disabilities at all (3).

In actions for the recovery of land, governed by 37 & 38 Vict. c. 57, s. 1, and 3 & 4 Wm. IV. c. 27, s. 24, allowance is made for infancy, coverture, and unsoundness of mind. Coverture is now probably only a disability, if at all, in the cases of persons married before January 1, 1883. The time allowed is six years from the cesser of the disability, or the death of the party under it, notwithstanding twelve years may have expired from the accrual of the cause of action, but in no case is more than thirty years allowed from that time (4).

A mortgagor's right to redeem is limited by sect. 7 of 37 & 38 Vict. c. 57, to twelve years from the time when the mortgagee went into possession, or from the last written acknowledgment of the mortgagor's title signed by the mortgagee. But it is expressly provided by the section that, when there are several mortgagees, or several

Right to
redeem.

(1) See *ante*, Part II. Ch. III. p. 149.

(2) See *ante*, Part III. Ch. III. p. 190.

(3) See *ante*, Part III. Ch. IV. p. 217.

(4) See *ante*, Part V. Ch. XV. p. 390, *et seq.*

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persons entitled under one mortgage, such an acknowledgment is only to operate against the estate or interest of the person making it, or any estate or interest to take effect in defeasance of such estate or interest. This section probably includes the case where a mortgagee has not taken possession of the land, or received its immediate proceeds, but has received the rents from a tenant in possession (1).

In all cases where a mortgagee has taken possession or received the profits of land within the meaning of the 7th section of 37 & 38 Vict. c. 57, the mortgagor's title will be extinguished by sect. 34 of 3 & 4 Wm. IV. c. 27, at the end of twelve years, unless some acknowledgment be given in the meantime so as to keep the title alive. And if the title be once extinguished, no acknowledgment subsequently given can revive it (2).

No allowance is made under this section for any disability on the part of the mortgagor (3).

(1) See *ante*, Part V. Ch. XXI. p. 464.

(2) See *ante*, p. 466.

(3) See *ante*, p. 469.

CHAPTER XXIII.

PROPERTY OF SPIRITUAL AND ELEEMOSYNARY CORPORATIONS SOLE (3 & 4 WM. IV. c. 27, s. 29).

THE 29th section of the Act 3 & 4 Wm. IV. c. 27 provides as follows :—

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“It shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual or eleemosynary corporation sole to make an entry or distress, or to bring an action or suit to recover any land or rent within such period as hereinafter is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress, or bring such action or suit, shall first have accrued; that is to say, the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies, and such term of six years taken together, shall amount to the full period of sixty years; and if such times taken together shall not amount to the full period of sixty years, then during such further number of years, in addition to such six years as will with the time of the holding of such two persons, and such six years, make up the full period of sixty years; and no such entry, distress, action or suit, shall be made or brought at any time beyond the determination of such period.”

3 & 4
Wm. IV.
c. 27, s. 29.

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This section only applies to spiritual and eleemosynary corporations sole, and excepts these bodies from the operation of the 1st section of 37 & 38 Vict. c. 57 (formerly the 2nd section of 3 & 4 Wm. IV. c. 27), and provides in their case a more extended period of limitation.

Tithes.

Tithes belonging to such bodies are excluded by the 1st section of 3 & 4 Wm. IV. c. 27, from the meaning of the word "land" throughout that Act and the amending Act 37 & 38 Vict. c. 57, and are therefore not affected by any of the provisions of either Act.

Tithe rent-charge.

Tithe rent-charge in general, as pointed out in a former chapter (1), is included in the word "rent" throughout the Act 3 & 4 Wm. IV. c. 27 (2), and, when in the hands of any spiritual or eleemosynary corporation sole, comes within the protection of the 29th section of that Act (3). The money payments in lieu of tithes made after the rates settled by 37 Hen. VIII. c. 12, in respect of houses in the City of London, are rent within the meaning of the Act, and when in the hands of spiritual or eleemosynary corporations sole would fall within the protection of the 29th section (4). The amount of arrears of tithe rent-charge recoverable is limited by the Tithe Commutation Act (5) to two years' arrears, and that provision would exempt all tithe rent-charges from the operation of the 42nd section of 3 & 4 Wm. IV. c. 27. By the Tithe Act, 1891 (6), which makes tithe rent-charge payable by the owner instead of the occupier, a sum on account of tithe rent-charge shall not be recoverable under the Act unless proceedings for such recovery have been commenced before the ex-

(1) Part V. Ch. II. p. 283.

(2) *Irish Land Commission v. Grant*, 10 App. Cas. 14.

(3) See *per* Lord Selborne, L.C., *Irish Land Commission v. Grant*, 10 App. Cas. at p. 29.

(4) *Payne v. Esdaile*, 13 App. Cas. 613.

(5) 6 & 7 Wm. IV. c. 71, ss. 81 & 82.

(6) 54 Vict. c. 8, s. 10.

piration of two years from the date at which it became payable.

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The 29th section of 3 & 4 Wm. IV. c. 27 operates, like the 1st section of 37 & 38 Vict. c. 57 (formerly the 2nd section of 3 & 4 Wm. IV. c. 27), by barring the right to bring an action or make a distress at the end of a certain period after the time when that right accrues; and the time when the right is to be deemed to accrue in each particular case must be determined by reference to the earlier sections of the Act 3 & 4 Wm. IV. c. 27, and to sect. 2 of 37 & 38 Vict. c. 57 (1). And it seems that the provisions as to acknowledgments contained in the 14th section of 3 & 4 Wm. IV. c. 27, will also be applicable to actions governed by the 29th section. When, by virtue of the 29th section, the remedy by action or distress is once taken away, the whole right to the inheritance in the land or rent is extinguished by the 34th section.

By the Ecclesiastical Commissioners Act, 1840 (2), all the estates of deaneries and canonries which were not suspended by the Act were, subject to the rights of existing holders, vested in a lay body, viz. in the Ecclesiastical Commissioners. Sect. 57 of the Act provided that the Ecclesiastical Commissioners, "for the purpose of obtaining possession" of the property vested in them by the Act, should "have and enjoy all rights, powers and remedies, at law and in equity, which belonged or belong or would belong or have belonged to the holder of the deanery," &c., in respect of which the property in question vested in the Commissioners. In the case of *Ecclesiastical Commissioners v. Rowe* (3), a question arose as to the effect of sect. 57. In that case an allotment under an Inclosure Act was made in 1818 in respect of premises held under a lease from a dean. The lease was renewed from time to time, but the allot-

Church
property
in lay
hands.

(1) *Archbishop of Dublin v. Lord Trimleston*, 12 Ir. Eq. R. 251.

(2) 3 & 4 Vict. c. 113.

(3) 5 App. Cas. 736.

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—

ment was not included in the renewals, and after 1821 the allotment was possessed adversely to the right of the dean. The dean died in 1854, never having claimed the allotment, and the estates of the deanery then became vested in the Ecclesiastical Commissioners. In 1877 the Commissioners brought an action to recover possession of the allotment. It was held by the House of Lords that, the right of action having accrued to the dean during his lifetime, sect. 57 preserved to the Commissioners the rights which the dean had during his lifetime, and therefore that the limitation in respect of the property in question was that provided by sect. 29, and that the Commissioners were not barred. Lord Selborne expressed an opinion that, when once the Commissioners had gained possession of any land vested in them by the Act, sect. 29 no longer applied to them.

In the case of the *Irish Land Commission v. Grant* (1), where property belonging to an ecclesiastical corporation sole had been vested in a lay body by an Act (2) which contained no such provision as sect. 57 of the Ecclesiastical Commissioners Act, 1840, the House of Lords held that the period of limitation applicable to the lay body for the recovery of tithe rent-charge formerly belonging to an ecclesiastical corporation sole was twenty years, and that sect. 29 of 3 & 4 Wm. IV. c. 27 had no application.

(1) 10 App. Cas. 14.

(2) 32 & 33 Vict. c. 42.

CHAPTER XXIV.

LIMITATION OF RIGHT TO RECOVER PRESENTATIONS AND
ADVOWSONS (3 & 4 WM. IV. C. 27, SS. 30, 31, 32, 33).

By the old common law, if a stranger usurped a patron's right of presenting to a living, and the clerk presented by the stranger was instituted, the patron's right to the presentation for that turn was lost, and could not be recovered by an action of *quare impedit*, as the church was full by the act of the usurper (1). Moreover, if the stranger's presentee was inducted, the patron's possession of the advowson was displaced, and could only be recovered by a real action called a writ of right of advowson (2).

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—

To remedy this it was enacted by the statute West. 2, 13 Edwd. I. c. 5, as follows :—

13 Ed. I.
c. 5.

“In writs of *darrein presentment* and *quare impedit* . . . if the defendant allegeth plenarty of the church of his own presentation, the plea shall not fail by reason of the plenarty, so that the writ be purchased within six months, though he cannot recover his presentation within the six months.”

If the true patron omitted to bring his action within six months, the seisin was gained by the usurper, and the patron had no other means of recovering the inheritance of the advowson but by the hazardous process of a writ of right. To remedy this the statute 7 Anne c. 18 was passed, which enacted that no usurpation upon

(1) Rogers' Eccl. Law, 21; Keilwey, 88.

(2) Rogers' Eccl. Law, 22.

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any avoidance should displace the estate or interest of any patron, or turn it to a right, but that such a patron might present or maintain a *quare impedit* upon the next avoidance, notwithstanding such usurpation.

The old action of *quare impedit* is now abolished (1), but an analogous action may still be brought which would seem to bear the same relation to the old action of *quare impedit*, that the present action to recover possession of land bears to the old action of ejectment (2).

Right to
presenta-
tion barred
in six
months.

The effect of these enactments is, that, if a stranger usurps a presentation, the rightful patron can recover the benefice by an action analogous to the old action of *quare impedit*, provided he pursue his remedy within six months, which period is calculated from the institution of the usurper's presentee (3); but, if the patron allows six months to pass without bringing his action, his right of presentation is lost for that turn without remedy. But the usurper gains no right to the advowson, nor anything more than the benefit of a single presentation (4).

Where the mortgagor of an advowson, who was equitably entitled to present to the benefice, filed a bill to compel the presentee to resign, it was held that the bill was as much within the limitation of the statute Westm. 2nd, as a *quare impedit*, and the bill, having been brought seven months after the institution of the presentee, was dismissed (5).

Title to
advowsons.

Before the Act 3 & 4 Wm. IV. c. 27, in the words of Sir William Blackstone (6), there was "no limitation with regard to the time within which any actions touching

(1) See *ante*, p. 412.

(2) See R. S. C. 1883, App. A. Part III. Sec. IV.; Whitehead's Church Law, p. 229.

(3) Keilwey, 88.

(4) Blackst. *lib.* 3, c. 16, 1st ed. Vol. III. p. 244.

(5) *Gardiner v. Griffith*, 2 P. Wms. 404. And see *Boteler v. Allington*, 3 Atk. 453.

(6) *Lib.* 3, c. 16, 1st ed. Vol. III. p. 250.

advowsons" were "to be brought, at least none later than the times of Richard I. and Henry III.; for by statute 1 Mary, sess. 2, c. 5, the Statute of Limitations 32 Henry VIII. c. 2, is declared not to extend to any writ of right of advowson, *quare impedit*, or assize of *darrein presentment*, or *jus patronatus*. And this upon very good reason, because it may very easily happen that the title to an advowson may not come in question, nor the right have opportunity to be tried, within sixty years, which is the longest period of limitation assigned by the statute of Henry VIII." Sir William Blackstone suggested that, although a limitation would be improper with respect only to the length of time, yet a limitation might be established with respect to the number of avoidances, or rather a limitation compounded of the length of time and the number of avoidances together; as, "for instance, if no seisin were admitted to be alleged in any of these writs of patronage, after sixty years and four (1) avoidances were past" (2). The law, as above stated, seems to have been substantially the same in Ireland (3).

This suggestion of Sir William Blackstone's was adopted by the Legislature and embodied in the Act 3 & 4 Wm. IV. c. 27, sects. 30, 31, 32 and 33 of which are as follows:—

"No person shall bring any *quare impedit*, or other action, or any suit to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice as the patron thereof, after the expiration of such period as hereinafter is mentioned (that is to say), the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims,

3 & 4
Wm. IV.
c. 27, s. 30

(1) "Three" in later editions.

(2) Blackst. Com. *lib.* 3, c. 16, 1st ed. Vol. III. p. 251.

(3) See 10 Car. 1 Sess. 2 Ir. c. 6.

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if the times of such incumbencies taken together shall amount to the full period of sixty years; and if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as with the times of such incumbencies will make up the full period of sixty years."

3 & 4
Wm. IV.
c. 27, s. 31

"Provided always that when on the avoidance after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation, or gift of the patron thereof, a clerk shall be presented or collated thereto by his Majesty, or the ordinary, by reason of a lapse, such last-mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation, or gift of such patron as aforesaid; but, when a clerk shall have been presented by his Majesty upon the avoidance of a benefice, in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk shall, for the purposes of this Act, be deemed a continuation of the incumbency of the clerk so made bishop."

Section 32.

"In the construction of this Act every person claiming a right to present to or bestow any ecclesiastical benefice as patron thereof by virtue of any estate, interest or right which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any *quare impedit*, action or suit shall be limited accordingly."

Section 33.

"No person shall bring any *quare impedit* or other action, or any suit to enforce a right to present to or bestow any ecclesiastical benefice, as the patron thereof, after the expiration of one hundred years from the time at which a clerk shall have obtained possession of such benefice, adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest, or undivided share, or alternate right of pre-

sentation or gift, held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share or right, held, or derived under the same title."

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These sections did not at first apply to Ireland, their operation being excluded by sect. 44, but they were extended to Ireland by the 1st and 2nd sections of 6 & 7 Vict. c. 54; the part of sect. 44, which provided that those sections should not extend to Ireland, was repealed by 37 & 38 Vict. c. 35, and the 1st and 2nd sections of 6 & 7 Vict. c. 54 have been repealed by 54 & 55 Vict. c. 67.

The 3rd section of 6 & 7 Vict. c. 54 interprets the meaning of sects. 30–32 of 3 & 4 Wm. IV. c. 27, and is as follows:—

"And whereas doubts have been entertained whether the several periods by the said Act (*i.e.* 3 & 4 Wm. IV. c. 27) limited for bringing any *quare impedit*, or other action, or any suit, to enforce a right to present to or bestow any ecclesiastical benefice as the patron thereof, apply to the case of a bishop claiming to have right to collate to or bestow any ecclesiastical benefice in his diocese, and it is expedient that all such doubts should be removed; be it therefore enacted that the several periods limited by the said Act, or by this Act, for bringing any *quare impedit* or other action, or any suit to enforce a right to present to or bestow any ecclesiastical benefice, shall apply to the case of any bishop claiming a right as patron to collate to or bestow any ecclesiastical benefice, and that such right shall be extinguished in the same manner and at the same periods as the right of any other patron to present to or bestow any ecclesiastical benefice, provided always that nothing herein contained shall be deemed to affect the right of

Limitation
of bishop's
right.
6 & 7 Vict.
c. 54, s. 3.

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of title.

any bishop to collate to any ecclesiastical benefice by reason of lapse."

The effect of these sections is to determine the period after which no action can be brought to recover an advowson, and by the 34th section the right to the advowson is, at the end of the same period, finally extinguished.

Possession
of benefice
must be
adverse.

Sect. 30 introduces the old doctrine of adverse possession, and time under that section will not run against a patron's right to present, from the mere fact of a benefice being in the hands of a clerk who did not obtain possession from such patron or his predecessor, but only if such possession was obtained adversely to the patron's title. This is necessary from the nature of the case, for if an advowson be vested in two or more co-parceners, joint tenants, or tenants in common, and a partition be made between them, each of them is separately seised of a right to present in turn independently of the rest (1), and such presentation is in no way inconsistent with the right of the other or others to present in turn subsequently. But, although a presentation by one co-parcener, joint tenant or tenant in common, in turn, is never considered adverse to the right of the partner in title, and although under the 30th section a presentation adverse to one entitled to present on any vacancy is not adverse to the right of another person entitled to present, yet the 33rd section, providing the longer period of limitation, makes a presentation adverse to one of such parties have the same effect as if it had been adverse to all.

Time runs
from
induction.

The time from which the statute begins to run on the occasion of an adverse presentation is the time when the clerk obtains possession of the benefice, and this, it seems, is the time of induction, which is the act by which the clerk is made complete incumbent (2).

(1) See 7 Anne, c. 18.

(2) See Watson, *The Clergyman's Law*, c. 15, p. 155.

If a patron neglect for six months to present to a benefice, the right to present for that turn lapses to the ordinary. If the ordinary neglect to fill the church within another period of six months, the right lapses to the metropolitan; and if he be guilty of the same neglect for a like period, the right lapses to the Crown; at least these are the three stages through which a right of presentation is said to lapse, as the law is generally laid down (1).

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CH. XXIV.
Lapse.

Sect. 31 provides that a presentation by the Crown or the ordinary on the occasion of a lapse, after the incumbency of a clerk presented by a usurper, shall be considered adverse to the right of the patron, and though it does not mention presentation by the metropolitan *eo nomine* when the right has lapsed to him, yet such a case is, no doubt, within the section, for the metropolitan is the superior ordinary of the whole province as being the guardian of the spiritualities (2).

Where an avoidance of a living is caused by the removal of an incumbent to a bishopric, the Crown has a prerogative right to present for that turn, even though the right be not exercised before the death of the incumbent so removed (3). Such a presentation is by sect. 31 not to be reckoned a presentation adverse to the right of the patron; but the incumbency of the clerk so presented is to be deemed a continuation of the last incumbency, whether the last incumbent obtained possession adversely to the title of the rightful patron or not.

Presen-
tation by
the Crown
in room of
a bishop.

There are other cases, however, in which the right of presentation passes to the Crown, as by forfeiture for simony (4), or by reason of the outlawry of the patron (5),

Presen-
tation by
the Crown
on for-
feiture.

(1) See Watson, *The Clergyman's Law*, c. 12, pp. 114, 115; Comyns' Dig. Eglise, H. 11, 12; Dyer, 348a.

(2) See 2 Coke's Inst. 398; Watson, c. 12, p. 114.

(3) See *Rex v. Archbishop of Armagh*, 2 Str. 837.

(4) See 31 Eliz. c. 6, s. 4.

(5) Com. Dig. Eglise, H. 6; Watson, *The Clergyman's Law*, c. 11 p. 104. See *post*, Part VIII. Ch. II.

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—

which are not specially mentioned in the statute; and as to these it may be observed that, although the presentation by the Crown in those cases is according to law and not a usurpation of the patron's right, yet it is made against the patron's will, and in prejudice of his general right to present in respect of the advowson vested in him, and therefore the clerk presented by the Crown may be said, in some sense, to obtain possession adversely to the patron's right.

It may be remarked that the statute which gives the right of presentation to the Crown in a case of simony expressly limits such right to that "one turn only."

Right of
presen-
tation
when
patron is
a Papist.

Where the right to present goes to either of the universities for the reason that the patron is a Papist, the presentation does not seem adverse to the patron's right; for the universities have no title to such presentation except that conferred on them by statute, and that is only a right to present during such time as the patron shall be and remain a Papist (1), so that their right depends upon the fact that a particular person is the patron, and their presentation is an assertion of the title being vested in such person.

Remain-
ders after
estates tail.

By the 32nd section a person claiming an estate in an advowson which the owner of an estate tail might have barred, is to be deemed to claim through the person entitled to such estate tail. The effect of this section is that a person entitled in remainder after an estate tail is barred by presentations adverse to a tenant in tail who had such power, or those claiming through him. But, as there is no provision that a remainderman is to be deemed to claim through a tenant in tail who could not have barred the estate in remainder, it seems that if such tenant in tail alien the estate, and create a base fee, the persons presenting in right of such base fee do not present

(1) 3 Jac. I. c. 5; 1 W. & M. Sess. 1, c. 26; 13 Anne, c. 13 (also called 12 Anne, Sess. 2, c. 14); 11 Geo. II. c. 17.

adversely to the right in remainder, and, if this is so, that right can never, in such circumstances, be barred so long as the base fee lasts, the law concerning advowsons being in this respect different from that relating to other hereditaments (1).

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There are no provisions either for disabilities or acknowledgments in actions with respect to rights of presentation governed by the 30th or following sections.

Disabilities
and
acknow-
ledgments.

(1) See *ante*, Part V. Ch. XVI. p. 405.

CHAPTER XXV.

TITLE TO LAND EXTINGUISHED BY DISPOSSESSION (3 & 4 WM. IV. c. 27, s. 34).

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CH. XXV.

3 & 4 Wm.
IV. c. 27,
s. 34.

By the 34th section of 3 & 4 Wm. IV. c. 27, it is enacted as follows:—

“At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of *quare impedit*, or other action or suit, the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action, or suit respectively, might have been made or brought within such period, shall be extinguished.”

Other sections of the Acts 3 & 4 Wm. IV. c. 27 and 37 & 38 Vict. c. 57 determine the time within which a right to bring an action, or to levy a distress for the recovery of land, rent-charges, or advowsons, must be enforced, and provide that such right of action or distress shall be barred if not prosecuted within that time.

The 34th section of 3 & 4 Wm. IV. c. 27 extinguishes the title of a claimant at the time when his remedy is barred, after which time he is an entire stranger to the estate, and his title afterwards cannot be revested by means of the doctrine of remitter (1). A doubt was in one case expressed by the Court whether the effect of this section was to extinguish a rent-charge (2). It is, however, quite clear that this doubt is unfounded (3), and it

(1) *Brassington v. Llewellyn*, 27 L. J. Exch. 297; *Bryan v. Cowdal*, 21 W. R. 693.

(2) *Hanks v. Palling*, 6 E. & B. 659, 668.

(3) See *ante*, Part V. Ch. II. p. 280.

would seem, even when there is a covenant to pay a rent-charge, that when the rent-charge is extinguished, as far as the land is concerned, the right of the covenantee to sue upon the covenant is also destroyed (1). And when a former owner has been out of possession for twelve years, an acknowledgment of his title by the person in possession cannot revive the title which has been extinguished (2).

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—

The principle introduced by the 34th section is a change from the principle of the old law. The statute of James only took away the remedy, leaving the title to the estate in the owner who was out of possession. But, even before the Act 3 & 4 Wm. IV. c. 27, possession for twenty years gave a *prima facie* right to recover in ejectment against one who had been in possession for a shorter period, and was enough in such an action, or even, as it would seem, in a writ of right, to cast on the defendant the obligation of making out a stronger claim (3).

Law before
the statute.

As the 34th section extinguishes the title of the dispossessed owner of land as soon as his right of action is barred, it is unnecessary, in any action for the recovery of land, to plead the statute specially; the defendant, in such an action, should simply plead that he is in possession (4).

Pleading
the statute.

It has been said that the effect of the statute is to execute a conveyance to the person in possession, and not only to extinguish the right of the former owner, but to transfer the legal fee simple (5). But the truer view is, that the operation of the statute in giving a title is merely negative; it extinguishes the right and title of the dispossessed owner, and leaves the occupant with a

Effect of
sect. 34.

(1) See *Sutton v. Sutton*, 22 Ch. D. 511.

(2) *Sanders v. Sanders*, 19 Ch. D. 373; 51 L. J. Ch. 276. *In re Hobbs. Hobbs v. Wade*, 36 Ch. D. 553.

(3) *Doe d. Harding v. Cooke*, 7 Bingh. 346.

(4) See R. S. C. 1883, O. XXI. r. 21; R. S. C. Ir. 1891, O. XXI. r. 21; *Heath v. Pugh*, 6 Q. B. D. *per* Lindley, J., at p. 353.

(5) *Per* Lord St. Leonards, *Scott v. Nixon*, 3 Dru. & War. 407. And see *Incorporated Society v. Richards*, 1 Dru. & War. 289.

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title gained by the fact of possession, and resting on the infirmity of the right of others to eject him (1).

A title gained by the operation of the statute is a good title, both in law and equity, and will be forced by the Court on a reluctant purchaser (2). But proof that a vendor, and those through whom he claims, have had independent possession of an estate for twelve years, would not, of course, be sufficient to establish a saleable title, without evidence to show the state of the title at the time such possession commenced.

Possession of land is *primâ facie* evidence of seisin in fee; but it by no means follows that a man who has gained a title to land from the fact of certain persons interested in it being barred of their rights, has got the fee simple vested in himself; for, although he may have gained an indefeasible title as against those who had an estate in possession, there may be persons entitled in reversion or remainder, whose rights are quite unaffected by the statute (3).

Though the title extinguished by the 34th section, that is, the title of the persons whose right of entry is taken away by the other sections of the Acts 3 & 4 Wm. IV. c. 27 and 37 & 38 Vict. c. 57, is not directly transferred to the wrong-doer who has been in possession, yet the title gained by such possession being, in some cases, limited by rights which still remain unextinguished, is clearly commensurate with the interest which the rightful owners have lost by the operation of the statute, and must, therefore, it would seem, have the same legal character, and be freehold, leasehold, or copyhold accordingly (4). But the person who by virtue of the statute

(1) See *Dixon v. Gayfere*, 17 Beav. 421; *Tichborne v. Weir*, 8 Times L. R. 713.

(2) *Scott v. Nixon*, 3 Dru. & War. 388; *Lethbridge v. Kirkman*, 25 L. J. Q. B. 89. And see *Tuthill v. Rogers*, 1 Jo. & Lat. 36, 72; 6 Ir. Eq. R. 429, 441; *Games v. Bonnor*, 54 L. J. Ch. 517; *Sands to Thompson*, 22 Ch. D. 614.

(3) See *ante*, Part V. Ch. V. p. 321.

(4) See *Rankin v. McMurtry*, 24 L. R. Ir. 290, p. 297.

gains a title to property held on lease does not thereby become liable to perform the covenants of the lease; the term is in no sense vested in him (1). And when a person has possession of copyhold land for the statutory period without paying any rent, or making any acknowledgment to the lord, and the lord's title is consequently barred, the interest which is acquired by the person in possession is a freehold interest (2).

Where two or more persons acquire a title under the statute by joint possession, they become joint tenants of the property so acquired (3).

A person who is in possession of land without title has, while he continues such possession, and before the statutory period has elapsed, a transmissible and inheritable interest in the property, though an interest which is liable, at any moment, to be defeated by the entry of the rightful owner; and if such person be succeeded in the possession by one claiming through him who holds till the expiration of the statutory period, such a successor has then as good a right to the possession as if he himself had occupied for the whole period (4).

Person in whose favour statute is running has a transmissible interest.

In the case of *The Agency Company v. Short* (5), which came before the Judicial Committee of the Privy Council, the land in dispute, situated in the colony of New South Wales, had, until shortly before the commencement of the action, been open bush. The plaintiffs had a good documentary title under a grant from the Crown, but had been out of possession for more than twenty years. An intruder without title had held possession for less than twenty years, and then entirely abandoned possession, and no other person took possession of the land, until the defendant, or those through whom he claimed, took

Possession abandoned by an intruder.

(1) *Tichborne v. Weir*, 8 Times L. R. 713.

(2) *Att.-Gen. v. Tomline*, 15 Ch. D. 150.

(3) *Ward v. Ward*, L. R. 6 Ch. 789; *Bolling v. Hobday*, 31 W. R. 9.

(4) *Asher v. Whitlock*, L. R. 1 Q. B. 1; *Keeffe v. Kirby*, 6 Ir. C. L. R. 591; *Clarke v. Clarke*, 2 Ir. R. C. L. 395.

(5) 13 App. Cas. 793. See *Willis v. Earl Howe*, 41 W. R. 435.

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possession, less than twenty years before action. The statute 3 & 4 Wm. IV. c. 27 had been adopted in the colony. It was decided that the title of the plaintiffs was unaffected by the statute. When possession was abandoned by the first intruder, there being no person against whom the rightful owner could bring an action, he was in the same position as he was before the intrusion took place.

Possession
by succes-
sive tres-
passers.

If a series of trespassers adverse to one another, and to the rightful owner, take and keep possession of an estate in succession for various periods, each less than twelve years, but exceeding in the whole twelve years, a different question arises. In *Dixon v. Gayfere* (1), which arose under 3 & 4 Wm. IV. c. 27, the rightful owner had been out of possession more than twenty years, and the land had been in the possession of a succession of trespassers independent of each other, none of whom was in possession twenty years. The Court had, subsequently to the expiration of twenty years from the time when the rightful owner was in possession, got possession of the estate, and was called upon to declare the rights of the parties claiming the equitable interest. Romilly, M.R., held that the Statute of Limitations had no operation. "Is the decision," said his Lordship, "to be in favour of that one of the trespassers who has held the estate for the longest period? Is it to be in favour of the first of them, or is it to be in favour of the last of them? The objections to each and every of them obtaining such a declaration appear to me to be insuperable. At law, no doubt the person possessed of the legal estate would obtain possession, or if the legal estate could not be shown to be in any one, the last possessor, that is, the person actually in possession, would hold the property, but not by reason of the validity of his own title, but by reason of the infirmity of the title of the claimants."

(1) 17 Beav. 421.

In that case Lord Romilly came to the conclusion that the Court, having got possession of the estate, and no claimant having had so much as twenty years' enjoyment, the statute did not apply, and the Court was bound to ascertain and declare the rights of the parties exactly as if that statute did not exist. This decision, so far as it relates to the legal rights of successive trespassers under the statute, has been overruled by the Court of Queen's Bench (1); and it is difficult to see how it could make any difference that the estates claimed were equitable and not legal, for by the operation of the 24th and 34th sections, equitable rights seem to be placed on the same footing as legal rights; and if so, the equitable estate must have been vested in some one other than the former rightful owner at the end of the twenty years, and it could not be divested by the fact of the estate subsequently coming into possession of the Court.

The law as to the extinction of the title of the former owner and as to the rights of successive occupiers holding without title and independently of each other, is well illustrated by two cases which arose with reference to the same piece of land (2). These cases were decided under 3 & 4 Wm. IV. c. 27, when the period of limitation was twenty years. A. B. had entered into possession as tenant at will to his father, the rightful owner, and held for about eighteen years till his death in 1834, when his widow took possession and retained it till 1845. Ejectment was then brought by C., to whom A. B.'s father had mortgaged the land after A. B.'s possession had commenced, and it was held that the action could not be maintained, as more than twenty-one years had elapsed since the commencement of A. B.'s possession as tenant at will (3). Subsequently D., claiming under the mort-

(1) *Asher v. Whitlock*, L. R. 1 Q. B. at p. 4.

(2) *Doe d. Goody v. Carter*, 9 Q. B. 863; *Doe d. Carter v. Barnard*, 13 Q. B. 945.

(3) *Doe d. Goody v. Carter*, *ubi supra*.

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gagee C., succeeded by some means in getting into possession of the property, and in 1848 A. B.'s widow, the defendant in the former action, brought ejectment to recover possession of the premises. In this action (1) she proved not only her own possession for thirteen years till the defendant's entry, but also her husband's possession for the eighteen years before his death, and that he left children who were living at the time of the action. Patteson, J., in delivering the judgment of the Court, said: "The lessor of the plaintiff had established her case if she had shown nothing but her own possession for thirteen years. The ground, however, of so saying would not be that possession alone is sufficient in ejectment (as it is in trespass) to maintain the action, but that such possession is *primâ facie* evidence of title, and, no other interest appearing in proof, evidence of seisin in fee. Here, however, the lessor of the plaintiff did more, for she proved the possession of her husband before her for eighteen years, which was *primâ facie* evidence of his seisin in fee; and, as he died in possession and left children, it was *primâ facie* evidence of the title of his heir, against which the lessor of the plaintiff's possession for thirteen years could not prevail; and, therefore, she has by her own showing proved the title to be in another, of which the defendant is entitled to take advantage" (2).

Possession
taken
under
colour of
title.

Where a person takes wrongful possession of land, and keeps it for the prescribed period of limitation, claiming to be himself entitled in fee, or not setting up any title at all, he gains the estate for his own benefit; but if he enters, claiming a limited interest under some instrument, it does not follow that he can, by possession till the rightful owner is barred, claim the whole estate in perpetuity. Thus, if a man obtains possession of land claiming under a will, he cannot afterwards set up another title to the land against the will, though it did

(1) *Doe d. Carter v. Barnard, ubi supra.*

(2) 13 Q. B. 953.

not operate to pass the land in question; and if he remain in possession till twelve years have elapsed and the title of the testator's heir be extinguished, he cannot claim by possession an interest in the property different from that which he would have taken if the property had passed by the will. If the interest devised to him by the will is a life estate, the devisees in remainder will be entitled to enter when that estate determines (1). And not only is a person who enters under a will estopped from setting up a title adverse to the will, but anyone who gains possession through a person interested in the land under the will is bound by the same principle of estoppel (2).

Whether possession was taken under the will or independently of it, is, it seems, a question of fact in each particular case (3).

This principle holds good, though the testator is himself a trespasser, and has not at the time of his death acquired a title by the statute against the rightful owner (4); but in all the cases yet decided on this subject the testator had at the time of his death some interest in the property in question which, if it had not been for the entry of the devisee on the faith of the devise, would have passed to the testator's heirs, or other persons claiming through him and bound by the will. If, however, a stranger's land, in which the testator had no interest, were to be taken possession of by a devisee for life, under the belief that it belonged to the testator and passed under the devise, it might perhaps be held that possession was not taken under the will, so as to estop the devisee from setting up an independent title in himself; because in such a case the persons whose interest was extinguished by

(1) *Hawksbee v. Hawksbee*, 11 Hare, 230; *Anstee v. Nelms*, 1 H. & N. 225; *Kernaghan v. McNally*, 12 Ir. Ch. R. 89; *Board v. Board*, L. R. 9 Q. B. 48. But see *Paine v. Jones*, L. R. 18 Eq. 320.

(2) *Hawksbee v. Hawksbee*, *Board v. Board*, *ubi supra*.

(3) *Anstee v. Nelms*, *ubi supra*.

(4) *Hawksbee v. Hawksbee*, *ubi supra*.

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—

the devisee's occupation were not bound by the will; and, therefore, it might be said that the wrongful possession had not been permitted on the faith of the will.

The doctrine laid down in the cases just referred to has been carried so far that the legal estate in land has been held to become vested in a trustee by the wrongful possession of his *cestui que trust*. This was decided in a case where property had been devised to trustees in trust for a person for life with limitations over, and the beneficial tenant for life, supposing that the land in question was part of the devised property, had gone into and retained possession of it, although in fact it was not devised at all, but had descended to the heir. It was held not only that the title to the land in question was acquired for the benefit of the persons entitled in remainder, but that the legal estate was vested in the trustees of the will, so that a purchaser, to whom the persons who had thus gained the beneficial estate conveyed the land by a conveyance to which the trustees were not parties, had only an equitable estate, and therefore his wife was not entitled to dower (1).

The decisions in *Board v. Board*, *Hawksbee v. Hawksbee*, and *Anstee v. Nelms* were distinguished in the case of *Paine v. Jones* (2) by Malins, V.-C.; in that case a testator had devised all his real property to his wife for life; she entered into possession of the land in question, which did not in fact pass by the will, and which should have gone to the heir, but which she believed did pass by the will; she continued in possession for the statutory period, and Malins, V.-C., held that she had acquired a good title in fee to the land by the statute, and was not estopped from saying that it had not passed under the will. Malins, V.-C., treated the cases of *Board v. Board*, *Anstee v. Nelms*, and *Hawksbee v. Hawksbee*, as proceeding on the principle, that if parties have some kind of title

(1) *Kernaghan v. McNally*, 12 Ir. Ch. R. 89.

(2) L. R. 18 Eq. 320.

under the will, they are estopped from denying the title of persons under the same will; but in the case before him the widow had no title whatever and was not estopped. This case seems quite inconsistent, not only with the cases mentioned, but also with *Kernaghan v. McNally* (1).

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—

If a tenant, during the continuance of his tenancy, encroaches on land, and holds it as part of the demised premises for the statutory period of limitation, his landlord will at the end of the term generally have the benefit of the encroachment. There are three ways in which such an encroachment has been said to operate in favour of the landlord: first, as a wrongful appropriation or robbery by the tenant for the landlord's benefit; secondly, as preventing the tenant on the principle of estoppel from disputing the landlord's title; or thirdly, when the encroachment is upon the waste of the lessor's manor, the tenant may be considered to have approved under the Statute of Merton (2) on behalf of the lord (3). Whatever may be the exact ground of the doctrine, the presumption raised seems rather to be one of fact than of law, for it may be rebutted by clear evidence that the tenant, at the time he enclosed, intended the encroachment for his own benefit, and not for the aggrandisement of the demised premises, and so for the landlord's benefit. But the presumption that the encroachment is at the determination of the tenancy held as part of the demised premises will prevail, unless there are circumstances leading plainly to an opposite conclusion (4). The fact that the tenant has always been rated separately in respect of the demised premises and in respect of the encroachment is no evidence for this purpose, unless it be shown that

Encroach-
ments by a
tenant.

(1) 12 Ir. Ch. Rep. 89.

(2) 20 Henr. III. c. 4.

(3) But see *Att.-Gen. v. Tomline*, 15 Ch. D. 150.

(4) *Doe d. Baddeley v. Massey*, 20 L. J. Q. B. 435, and cases there referred to; *Doe v. Tidbury*, 14 C. B. 304; 23 L. J. C. P. 57; *Kingsmill v. Millard*, 11 Ex. 313; *Andrews v. Hailes*, 2 E. & B. 349; 22 L. J. Q. B. 409; *Earl of Lisburne v. Davies*, L. R. 1 C. P. 259.

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the landlord was aware of the fact (1). In order that the rule should apply, it is not necessary that the land originally comprised in the lease, and that taken by encroachment, should be absolutely contiguous; and it has been held that land enclosed on the further side of a road or stream, if held and occupied with the property leased, was, at the end of the lease, the landlord's property (2). But contiguity is a material fact supporting the presumption in the landlord's favour (3); and in like manner proximity will support the same presumption, if the encroachment be so near to the original holding that, by reason of that proximity, the tenant gained the opportunity of annexing it (4).

In the case of *Earl of Lisburne v. Davies* (4) just referred to the encroachment was made on the waste of the landlord's manor, not by the tenant himself, but by B., a labourer, who took three years in completing the enclosure, at the end of which time the tenant paid B. a small sum and was permitted to take possession of the enclosed land. The Court, acting as a jury, inferred from the circumstances as a fact that B. enclosed the land as a labourer employed by the tenant, and that the money was paid to him for his labour in enclosing it; and they held the landlord to be entitled to the enclosure at the determination of the tenancy, the presumption in his favour not being rebutted by the fact that the land enclosed was separated from the holding by a small stream and a strip of waste land.

The assent of the landlord to an encroachment by the tenant on the landlord's land does not prevent the application of the presumption that the encroachment was held as part of the demised premises (5).

(1) *Andrews v. Hailes, ubi supra.*

(2) *Andrews v. Hailes, Kingsmill v. Millard, Earl of Lisburne v. Davies, ubi supra.*

(3) *Per Coleridge, J. Andrews v. Hailes, 2 E. & B. 354; 22 L. J. Q. B. 411.*

(4) *Earl of Lisburne v. Davies, L. R. 1 C. P. 259.*

(5) *Whitmore v. Humphries, L. R. 7 C. P. 1; 41 L. J. C. P. 43,*

If a tenant takes a new lease of his former holding from his landlord and the encroachment is not included in the new lease, the presumption will be rebutted (1).

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It has been doubted whether the rule applies at all to the case of a copyholder encroaching on the waste of the lord of the manor, and an opinion has been expressed that the rule is confined to encroachment by a leaseholder (2).

If a trespasser occupies without title, and for less than the statutory period a plot of land belonging to another person, and afterwards takes as tenant from the owner of the plot a strip of adjacent land, the mere payment of rent for the adjacent land will not change the character of the possession of the plot of land first occupied, or prevent the trespasser from acquiring as against his landlord, by virtue of the statute, a title to that plot (3).

Trespasser
becoming
tenant.

The Land Transfer Act, 1875, contains a remarkable provision (4), which is as follows:—

Possession
adverse to
registered
title.

“A title to any land adverse to, or in derogation of the title of the registered proprietor, shall not be acquired by any length of possession, but this section shall not prejudice, as against any person registered as first proprietor of land with a possessory title only, any adverse claim in respect of length of possession of any other person who was in possession of such land at the time when the registration of such first proprietor took place.”

38 & 39
Vict. c. 87,
s. 21.

There appears to be no judicial interpretation of this section, the provisions of which are so extraordinary that it would be hazardous to say what is their effect.

(1) *Att.-Gen. v. Tomline*, 15 Ch. D. 150.

(2) *Att.-Gen. v. Tomline*, *ubi supra*.

(3) *Dixon v. Baty*, L. R. 1 Exch. 259; 12 Jur. N. S. 1024.

(4) 38 & 39 Vict. c. 87, s. 21.

CHAPTER XXVI.

EFFECT ON THE TITLE TO LAND OF PAYMENT OF RENT BY
A TENANT (3 & 4 WM. IV. C. 27, s. 35).PART V.
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—
Effect of
earlier
sections of
3 & 4 Wm.
IV. on re-
versioner's
right.

THE object of several of the earlier sections of 3 & 4 Wm. IV. c. 27 was to provide a limitation of time against the reversioner's right to recover property let on lease. The general effect of these sections is that time runs against a landlord: first, in the case of a tenancy at will from the time when the tenancy is determined if the tenancy is determined within a year, or, if the tenancy is not determined within a year, from the end of one year after the commencement of the tenancy (1); second, in the case of a tenancy from year to year without any lease in writing, from the end of the first year, or from the last payment of rent after that time (2); third, in the case of a demise in writing, reserving a rent amounting to twenty shillings a year, from the first time the rent has been received by a wrongful claimant to the reversion, if no subsequent payment has been made to the person entitled (3); but fourth, if the tenant pays rent to no one, or fifth, where there is a lease in writing reserving a rent less than twenty shillings a year, if the rent be paid to a wrongful claimant, time will not run against the reversioner till the determination of the lease.

The sections just referred to have, when coupled with the 34th section, the effect of taking away the right from

(1) 3 & 4 Wm. IV. c. 27, s. 7.

(2) *Ib.* s. 8.(3) *Ib.* s. 9.

the former owner of the reversion ; but they do not confer the right so taken away on any one else. It will be remembered also that under other sections (1) in the earlier part of the Act 3 & 4 Wm. IV. c. 27, time runs against the right of the owner of land from the time when he discontinues the receipt of the profits of the land. It has been said that “receipt of the profits” of land in the Act 3 & 4 Wm. IV. c. 27 means (2), not the receipt of rent from a tenant, but the receipt by the hands of a bailiff, or agent, of the actual profits made by the cultivation or use of the land. No effect is given by the earlier sections of the Act 3 & 4 Wm. IV. c. 27, to the receipt of rent reserved on a lease, as either giving or preserving a title. It seems to have been apprehended that a tenant, though paying rent to another person as his landlord, might take advantage of the silence of those sections as to the effect of such payment of rent, and dispute the title of such person though rightfully entitled to the reversion, or at least might dispute the title of such person, if he had only obtained the payment by a wrongful claim. The ordinary rule of law as to estoppel existing between a landlord and a tenant paying rent might perhaps have afforded a sufficient answer to any questions of this sort. But they are prevented by the express provisions of the 35th section of 3 & 4 Wm. IV. c. 27, which enacts as follows :—

“The receipt of the rent payable by any tenant from year to year, or other lessee shall, as against such lessee or any person claiming under him (but subject to the lease) be deemed to be the receipt of the profits of the land for the purposes of this Act.”

35th section of 3 & 4 Wm. IV. c. 27.

Receipt of the profits of the land is throughout the Act 3 & 4 Wm. IV. c. 27, treated as equivalent to actual possession ; so that the effect of this section is that, where a tenant pays rent to another person as rever-

Possession of a person paying rent to another.

(1) See Part V. Ch. III.

(2) See Part V. Ch. III. p. 300.

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sioner, the possession of such tenant becomes as against himself the possession of the person so receiving the rent for the purpose of supporting his title to the reversion expectant on the lease. The title of a landlord, therefore, can never be displaced by the occupation of his tenant so long as that tenant pays him rent. And if a person having no title grants a lease, or if, a lease having been granted by another person, some one without title puts in a wrongful claim to the reversion, in either case the receipt of rent from the tenant for twelve years will now, it would seem, give the lessor, or person claiming the reversion, a title to the reversion under the statute as against the tenant who pays the rent. And if, during that period, the occupying tenant gain a title as against the rightful owner of the land by the dispossession of such owner, the title of the tenant will enure for the benefit of the person receiving the rent, so far as the reversion is concerned. And similarly, if in such a case the person in receipt of the rent from the occupier is himself paying rent to a third person as superior lessor, the title to the ultimate reversion will be gained for such third person (1).

Payment of rent by a lessee has, under the 35th section, no effect except as against "such lessee or any person claiming under him." In all cases, therefore, in which the period of limitation has not run out against the title of the rightful reversioner, he will still have the reversion vested in him, and have the right to recover the land at the determination of the lease. Such, for instance, would be the case where land has been demised for a long term by a lease in writing at a rent of less than twenty shillings a year, and the tenant has for more than twenty years paid the rent to a person wrongfully claiming to be entitled to the reversion.

Tenancy at
will reserv-
ing rent.

A question has been raised in a former chapter (2),

(1) See Lord St. Leonards' Prop. Stat. p. 47.

(2) Part V. Ch. VIII.

whether a demise at will reserving rent is a lease within the meaning of the 35th section. It is submitted that it is within the section and that payment of such rent to the reversioner would consequently preserve his title from being barred by the operation of the 7th section of 3 & 4 Wm. IV. c. 27.

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—

If a mortgagee of land on lease enters into the receipt of the rent, he will, under the 35th section, gain a title to the reversion as against the tenant who makes the payment. The effect of such receipt of rent on the mortgagor's right to redeem has already been considered (1).

Mortgagee
in receipt
of rent.

(1) See Part V. Ch. XXI. p. 464.

CHAPTER XXVII.

DOWER (3 & 4 WM. IV. c. 27, s. 41).

PART V.
CH. XXVII.3 & 4 Wm.
IV. c. 27,
s. 41.

SECTION 41 of 3 & 4 Wm. IV. c. 27 provides as follows :—

“No arrears of dower, nor any damages on account of such arrears shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit.”

It has already been seen that an action by a widow to obtain an assignment of dower is an action to recover land within the limitation of the 1st section of 37 & 38 Vict. c. 57 (formerly the 2nd section of 3 & 4 Wm. IV. c. 27), and proceedings in equity for the same purpose are limited to the same period by the 24th section of 3 & 4 Wm. IV. c. 27 (1). Consequently, if no such action in law or in equity is commenced within twelve years next after the widow's right to dower accrued, her title to dower is altogether barred by the 34th section of 3 & 4 Wm. IV. c. 27, and she is without remedy as if her right never existed. Before the Act 3 & 4 Wm. IV. c. 27, there was no period limited for bringing a writ of dower (2), and no limitation of the amount of arrears recoverable (3). By the 41st section of 3 & 4 Wm. IV. c. 27, the amount recoverable is limited to six years' arrears, and it should be noticed that no extension is allowed either in the case of a widow being under disability when her right accrues, or in the case of an acknowledgment of her right to arrears being made by the person in possession of the land.

(1) See *ante*, Part V. Ch. II. p. 284; *Marshall v. Smith*, 34 L. J. Ch. 189.

(2) *Park on Dower*, 311.

(3) *Oliver v. Richardson*, 9 Ves. 222.

CHAPTER XXVIII.

SUITS IN SPIRITUAL COURTS (3 & 4 WM. IV. c. 27, s. 43).

THE 43rd section of 3 & 4 Wm. IV. c. 27 enacts as follows :—

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“No person claiming any tithes, legacy, or other property, for the recovery of which he might bring an action or suit at law or in equity, shall bring a suit or other proceeding in any spiritual court to recover the same but within the period during which he might bring such action or suit at law or in equity.”

3 & 4 Wm.
IV. c. 27,
s. 43.

The effect of this section is to extend the provisions of the Act 3 & 4 Wm. IV. c. 27, regarding actions at law and suits in equity, to proceedings in the ecclesiastical courts, so far as concerns property which may be recovered in such courts.

Proceedings for the recovery of legacies in the ecclesiastical courts were limited to proceedings for their recovery out of legal assets (1), and do not appear to have ever been much resorted to or well known (2). The jurisdiction of the spiritual courts to entertain such proceedings has now been abolished, and was not transferred to the Court of Probate with the rest of the jurisdiction of the spiritual courts in testamentary matters (3).

Legacies.

The provision as to tithes is of but little more importance. The Act 3 & 4 Wm. IV. c. 27 does not deal with suits for the recovery of penalties for not setting

Tithes.

(1) *Barker v. May*, 9 B. & C. 489.

(2) See 3 Hagg. Eccl. Rep. 161*n*.

(3) See 20 & 21 Vict. c. 77, ss. 3 & 23.

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—

out tithes, or for the recovery of the value of tithes, the time for bringing such suits being limited by 53 Geo. III. c. 127, s. 5 (1), to six years from the time when the tithes became due; nor does the Act 3 & 4 Wm. IV. c. 27 affect the liability of land to tithes, the effect of time on such liability being governed by 2 & 3 Wm. IV. c. 100 (1), and the Act 3 & 4 Wm. IV. c. 27 has no operation on the titles to tithes which belong to spiritual or eleemosynary corporations sole, the effect of time on such titles not being affected by any statute (1). The only question as to tithes left for the Act 3 & 4 Wm. IV. c. 27 to affect is the title to tithes which belong to lay tithe-owners, and on the question of title to tithes the spiritual courts have but a very limited jurisdiction (2). Most tithes have now been commuted, and it is hardly likely that any question in relation to them can now be determined in the ecclesiastical courts. Should any question of title to tithes ever arise in any ecclesiastical court for recovering the value of tithes in such a way that the court can take cognisance of them, it must, it seems, be dealt with as within the provisions of the Act 3 & 4 Wm. IV. c. 27, though the time for bringing the suit itself would be limited by the Act 53 Geo. III. c. 127.

Where, by virtue of the 34th section of 3 & 4 Wm. IV. c. 27, the title to any tithes is extinguished, such title must be considered as extinguished for all purposes of proceedings in the ecclesiastical courts, as well as in all other courts.

(1) See *ante*, Part V. Ch. II. p. 278.

(2) 2 Eagle on Tithes, 295.

PART VI.

CHAPTER I.

PENAL ACTIONS (31 ELIZ. C. 5, S. 5 ; 3 & 4 WM. IV.
C. 42, S. 3).

THE earliest statute now in force limiting the time for bringing penal actions is 31 Eliz. c. 5, the 5th section of which is as follows :—

“ All actions, suits, bills, indictments, or informations which, after twenty days after the end of this session of parliament shall be had, brought, sued, or exhibited for any forfeiture upon any statute penal made or to be made, whereby the forfeiture is or shall be limited to the Queen, her heirs, or successors only, shall be had, brought, sued, or exhibited within two years next after the offence committed or to be committed against such Act penal, and not after two years ; and all actions, suits, bills, or informations, which, after the said twenty days, shall be had, brought, sued, or commenced for any forfeiture upon any penal statute made or to be made, except the Statute of Tillage, the benefit and suit whereof is or shall be by the said statute limited to the Queen, her heirs or successors, and to any other which shall prosecute in that behalf, shall be had, brought, sued, or commenced by any person that may lawfully pursue for the same as aforesaid within one year next after the offence committed, or to be committed against the said statute ; and in default of such pursuit,

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31 Eliz. c.
5, s. 5.

PART VI. — then the same shall be had, sued, exhibited, or brought for the Queen's Majesty, her heirs, or successors, at any time within two years after that year ended. And if any action, suit, bill, indictment or information for any offence against any penal statute made or to be made, except the Statute of Tillage, shall be brought after the time in that behalf before limited, then the same shall be void and of no effect, any Act or statute made to the contrary notwithstanding."

"Provided always, that where any action, information indictment, or other suit is, or shall be limited by any statute penal to be had, sued, commenced, or brought within shorter time than is afore rehearsed, that in every such case the action, information, indictment, or other suit shall be brought within the time limited by such statute."

It was held that this statute did not apply to an action brought by the party grieved, but that he was at liberty to sue as before (1). This case is now provided for by the 3rd section of 3 & 4 Wm. IV. c. 42, which amongst other things enacts as follows:—

3 & 4 Wm.
IV. c. 42,
s. 3.

"All actions for penalties, damages, or sums of money given to the party grieved by any statute now or hereafter to be in force shall be commenced and sued . . . within two years after the cause of such actions or suits, but not after; provided that nothing herein contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited."

A similar provision with regard to Ireland is enacted by the 16 & 17 Vict. c. 113, s. 20.

The effect of these statutes is that an action for penalties, where the whole penalty is given to the Crown, must be brought within two years; where the penalty goes partly to the Crown and partly to the informer, the action must be brought within one year by an informer, or

(1) Noy's Rep. 71.

within two years after the end of that year by the Crown ; where the action is brought by the party grieved, it must be commenced within two years, subject in this case to the exceptions in favour of disabilities provided by the 4th section of 3 & 4 Wm. IV. c. 42, as amended by the Mercantile Law Amendment Act (1).

It seems doubtful whether an action brought by an informer, where no part of the benefit goes to the Crown, is left unaffected by any Statute of Limitations, or is governed by the Act 31 Eliz. c. 5, s. 5.

The words of the earlier part of the 5th section of the Act of Elizabeth seem clearly to speak only of two cases : 1st, where the whole penalty goes to the Crown ; 2nd, where it goes to the Crown and the informer jointly ; and the words of the latter part of the section, declaring that any action shall be void which is brought after the time before limited in that behalf, would, according to the ordinary rules of construction, be held to refer only to such actions as had been previously limited. And the earliest authority (2) is in favour of this view : but, after some conflict between the cases (3), it was decided by the Court of Exchequer (4) that the statute of Elizabeth limits actions by an informer, when no part of the benefit goes to the Crown, as well as those in which the Crown has an interest.

The Irish statute 2 Geo. I. c. 20, ss. 3 and 4, contains Irish Acts. provisions exactly similar to the English Act of Elizabeth. There is also an earlier Irish Act (5) which provides slightly different times of limitation for the same actions

(1) 19 & 20 Vict. c. 97, s. 10.

(2) *Culliford v. Blandford*, Carth. 232 ; Comb. 195 ; Holt, 522 ; 4 Mod. 129 ; S. C. *sub. nom.* *Calliford v. Blawford*, 1 Shower, 353.

(3) *Culliford v. Blandford*, *ubi supra* ; *Lookup v. Frederick*, 4 Burr. 2018 ; Buller's N. P. 195 ; *Chance v. Adams*, 1 Lord Raymond, 77 ; *R. v. Gall*, 3 Salk. 200.

(4) *Dyer v. Best*, L. R. 1 Exch. 152 ; 35 L. J. Exch. 105. See *Lewis v. Davis*, L. R. 10 Exch. 86. But see *per* Bramwell, L.J. *Robinson v. Currey*, 7 Q. B. D. at p. 471.

(5) 28 Hen. VIII. c. 21, Ir.

PART VI. as 2 Geo. I. c. 20, and also imposes a limitation of one year where the informer sues only for himself. It has been held that the statute 28 Hen. VIII. c. 21, Ir., applies where the penalty is to be divided between the informer and a House of Correction (1). That case was referred to and approved of by Pollock, C.B. in the case of *Dyer v. Best* (2).

An action by an officer of the Goldsmiths' Company, empowered by 7 & 8 Vict. c. 22, s. 3 to sue dealers who have in their possession wares with forged marks, is not an action by a common informer within 31 Eliz. c. 5, or by a party grieved within 3 & 4 Wm. IV. c. 42, s. 3, and can be brought more than two years after the accrual of the cause of action (3).

It has been decided under the statute of Elizabeth that if an act for which a penalty is imposed by statute be also an offence at common law, the prosecution for such an act as an offence at common law is not restrained by the statute of Elizabeth (4). It was also held under the old practice that in an action of debt for a penalty the defendant need not plead the statute, but might take advantage of it under the plea of *nil debet* (4), but now it would seem that in such a case the defendant is bound to plead the statute, except where a plea of the general issue by statute is admissible (5).

Informa-
tion.

In the case of an information under the old method of process to recover penalties in the Exchequer for offences against the revenue laws, it was held that the issuing of process was the commencement of the proceeding; and it was up to the time of issuing process, and not to the date of the filing of the information, that the period of two years limited by the statute of Elizabeth was to be

- (1) *Barrett v. Johnson*, 2 Jones Exch. R. Ir. 197.
- (2) L. R. 1 Exch. 152.
- (3) *Robinson v. Currey*, 7 Q. B. D. 465.
- (4) See Bull. N. P. p. 195.
- (5) See R. S. C. 1883, O. XIX. rr. 12 & 15; R. S. C. Ir. 1891, O. XIX. rr. 13 & 16. And see *post*, Part VIII. Ch. I. p. 542.

reckoned (1). But now the writ of *subpœna* to compel an appearance in such cases is abolished, and the proceedings are commenced by the filing of the information; it is, therefore, at the date of this step that the statute now ceases to run (2).

PART VI.

(1) *Att.-Gen. v. Hall*, 11 Price, 760.

(2) 28 & 29 Vict. c. 104, ss. 6, 8, 10.

PART VII.

EFFECT OF TIME ON RIGHTS OF THE
CROWN AND PROCEEDINGS OF CROWN
PRACTICE.

CHAPTER I.

RIGHTS OF THE CROWN AND DUCHY OF CORNWALL
(9 GEO. III. C. 16; 7 & 8 VICT. C. 105; 24 & 25 VICT.
C. 53; 24 & 25 VICT. C. 62).

PART VII. ACCORDING to the rules of the old common law no right
OH. I.
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*Nullum
tempus
occurrit
regi.* once vested in the Crown could be prejudiced by the
mere lapse of time. *Nullum tempus occurrit regi* was a
maxim applicable on all occasions. It has been said that
the rule is founded on the doctrine that the sovereign
can do no wrong, from which the law determines that he
cannot be guilty of negligence or laches (1).

The law is still the same in all cases where the right of
the Crown has not been expressly limited by statute, and
accordingly prosecutions for felonies and misdemeanours
may, in general, be commenced any length of time after
the commission of the crime (2).

Debts due
to the
Crown.

No limitation is prescribed by any statute to the right

(1) Stephen's Comm. Bk. IV. Part I. Ch. 6, Vol. II. p. 473; 11th
ed. Vol. II. p. 490.

(2) Stephen's Comm. *ubi supra*. See *per* Lord Ellenborough, C.J.
Dover v. Maestaer, 5 Esp., at p. 93.

to recover Crown debts ; consequently, when a chose in action is once vested in the Crown, no lapse of time will bar the Crown's remedy on it. But where to a *scire facias* issued at the suit of the Crown, founded on a writ of *diem clausit extremum* (1) against a debtor to the Crown under which the defendant was found indebted to the Crown's debtor upon a bill of exchange, and calling on the defendant to pay the bill to the Crown, the defendant pleaded that the debt was not contracted, and did not accrue to the Crown's debtor within the statutory period before his death, the plea was held good on demurrer, on the ground that the Crown is only entitled to the debtor's right, and cannot create or revive a right if none existed, or if it has become barred (2). If, however, the period necessary to bar a creditor's remedy under the statute of James has not actually expired before his debt becomes vested in the Crown, the statute has no operation against the Crown's right to recover. And, if the Crown transfer a Crown debt to a subject after the statutory period has elapsed, the assignee will not be barred of his right of action, at least if he sue immediately (3). If such assignee allow six years to elapse from the time when a simple contract debt was assigned to him from the Crown, it would seem hard to say that the assignee would not be barred by the statute. But, if the period during which the debt might have been sued for by a subject before it became vested in the Crown, and the period which has elapsed, since it again passed from the Crown into the hands of a subject, be each separately less than six years—but together amount to more than six years—in such a case it is not clear whether the assignee's right of action is barred or not (4).

The limitations of time with respect to penal actions

(1) See Tidd's Practice, 9th ed. 1057, 1091.

(2) *Rex v. Morrall*, 6 Price, 24.

(3) *Lambert v. Taylor*, 4 B. & C. 138.

(4) See *Lambert v. Taylor*, 4 B. & C. pp. 144, 153.

PART VII. brought on behalf of the Crown have been discussed
CH. I. above (1).

**Petition of
 right.**

No Statute of Limitation applies to a petition of right, and the Crown cannot plead any Statute of Limitation in answer to such a petition (2), except in the case of a petition of right in respect of the personal estate of any deceased person (3).

**Real pro-
 perty of
 the Crown.
 9 Geo. III.
 c. 16.**

By the Act 9 Geo. III. c. 16, commonly called the "*Nullum Tempus* Act," it is in effect provided that the Crown shall not sue for or lay claim to any manors or other real property (other than liberties or franchises), except when the right or title to the same shall have first accrued within sixty years before the commencement of proceedings, unless the Crown shall have received the rents or profits thereof, or of some manor or other hereditament of which the premises in question are part within the said space of sixty years, or the same shall have been in charge to the Crown, or have stood *insuper* of record within that time. And after the lapse of that period the subject is secured in the quiet enjoyment of the property, both against the Crown and against all persons claiming by colour of letters patent, or grants upon suggestion of concealment, or wrongful detaining (4). When any reversion or remainder is vested in the Crown, or when any limited estate has been granted by the Crown, the Crown is allowed a like period of sixty years to enforce its rights from the time when the estate comes or ought to come into possession (5). The manors, lands, &c., to which the subject's title is established by the Act, are to be held of the Crown on the same tenures as they would have been if the title confirmed had originally been valid at law (6). Provision is also

(1) See Part VI.

(2) *Rustomjee v. the Queen*, 1 Q. B. D. 487.

(3) 47 & 48 Vict. c. 71, s. 3. See *ante*, p. 174.

(4) Sect. 1.

(5) Sects. 3, 4.

(6) Sect. 5.

made for securing to the Crown all fee-farm-rents or other rents which have been paid out of such manors, lands, &c., within sixty years of any action brought to recover such rents (1).

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It is by the same Act provided that, where the rents or profits of any lands are in charge with the proper officers of the revenue, such rents and profits are to be considered duly in charge within the meaning of the statute. But no putting in charge of manors or lands which have virtually been out of charge is to be deemed a putting in charge, unless thereupon such manors or lands have been in some suit on behalf of the Crown adjudged to belong to the Crown within the period of sixty years thereinbefore limited (2).

As by the first section of this statute time runs against the Crown's right to recover real property only from the time when such right accrued, the sections which provide for the Crown's rights in respect of reversions and particular estates seem quite unnecessary. These sections were borrowed from the statute of 21 Jac. I. c. 2, which was the foundation of the *Nullum Tempus* Act, and in the earlier statute their meaning is clear; for by that statute the rights of the Crown were to be barred when the subject had been sixty years in possession before the passing of the Act; and as the subject might have been in possession for that time without any right having accrued to the Crown, there was inserted a direct saving of reversions then vested in the Crown (3).

21 Jac. I.
c. 2.

The statute of James does not in all points correspond with the *Nullum Tempus* Act, but the provisions of the two are generally similar, and a commentary by Lord

(1) Sect. 7. See *Doe d. William IV. v. Roberts*, 13 M. & W. 520; *Att.-Gen. for British Honduras v. Bristowe*, 6 App. Cas. 143.

(2) Sects. 2 & 10. See 3rd Inst. 189.

(3) See *Tuthill v. Rogers*, 1 Jo. & Lat. 83; 6 Ir. Eq. R. 451.

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 Coke in his 3rd Institute (1) on the earlier enactment will be found to explain most of the technical expressions used in the later statute. With respect to the provisions concerning fee-farm-rents, from which the 7th section of 9 Geo. III. c. 16, seems to be taken, he says: "This was added for the preserving of the king's fee-farms and rent out of such manors, &c., which are established and made sure by this Act. For example, King Edward VI. did grant the manor of D., which came to him by the statute of Chanteries, to I. S. and his heirs, reserving a fee-farm or any other rent, which grant for some imperfection was insufficient in law to pass the said manor and yet is established and made sure by this Act. This proviso maketh good the fee-farm or rent to the king, if he hath been answered the same by the greater part of sixty years last past" (2).

The rights of the subject as against the Crown in Ireland were left unprotected by lapse of time until the passing of the Act 48 Geo. III. c. 47, which contains, with respect to the claims of the Crown in Ireland, almost the same provisions as those of the English *Nullum Tempus* Act. The meaning of these Acts was considered and the effect of their various sections commented on in an Irish case (3) heard before Sir Edward Sugden, L.C., and the Master of the Rolls. In 1680 certain lands had been granted by the Crown to A. in tail male by letters patent, reserving a quit rent of 3*d.* per acre. In 1681 A. conveyed the land to S., the conveyance expressly saving the rights of the Crown. In 1776 the estate so granted determined by the failure of A.'s male issue; but S.'s representatives remained in possession of the property till 1841, and the quit rent was regularly paid to and received by the Crown for the whole of that time. It was held that, by the operation of

(1) 3rd Inst. 188-191.

(2) 3rd Inst. 191.

(3) *Tuthill v. Rogers*, 1 Jo. & Lat. 36; 6 Ir. Eq. 429.

the Act 48 Geo. III. c. 47, a vendor claiming under S. PART VII.
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— had, as against the Crown, a good title to the fee simple of the land, and one which would be forced on a purchaser; and that at the same time the Crown had an indefeasible right to the quit-rent which had been so long paid. On the construction of the English Act it was decided that, where returns had been made of tithes by the auditors to the revenue within sixty years before suit, although the return had always been *nil*, there had been a sufficient keeping in charge to prevent the right of the Crown being barred by lapse of time (1). The correctness of the decision in *Att.-Gen. v. Eardley* (1) was questioned by Lord St. Leonards when Lord Chancellor of Ireland (2).

By two statutes of the present reign (3) the law as to the effect of keeping lands in charge to the Crown has been to some extent altered, and it is now enacted that the Queen's Majesty or her successors shall not sue any person for any manors or hereditaments whatsoever (other than liberties or franchises), which such person or any one through whom he claims shall have held or enjoyed or taken the rents or profits thereof for sixty years before suit, by reason only that the same manors or hereditaments or the rents or profits thereof shall have been in charge to the Crown, or stood *insuper* of record within the said space of sixty years; but that such having been in charge and such standing *insuper* of record shall be as against such person, and all claiming under him, of no form or effect (4). 24 & 25
Vict. c. 62,
and 39 &
40 Vict. c.
37.

By the Act 24 & 25 Vict. c. 62 it is also provided that the Queen's Majesty, her predecessors and successors, shall not be deemed for the purposes of the 9 Geo. III. c. 16, to have been answered the rents or profits of any

(1) *Att.-Gen. v. Eardley*, 8 Price, 39; *Att.-Gen. v. Maxwell*, *ib.* 76.

(2) *Tuthill v. Rogers*, 6 Ir. Eq. R. 450; 1 Jo. & Lat. 82.

(3) 24 & 25 Vict. c. 62 (England); 39 & 40 Vict. c. 37 (Ireland).

(4) Sect. 1 of 24 & 25 Vict. c. 62, and of 39 & 40 Vict. c. 37.

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lands or hereditaments which shall have been held or enjoyed, or of which the rents or profits shall have been taken by any other persons for sixty years next before any proceeding for recovering the same, by reason only of the same lands or hereditaments having been part of any honour or manor or other hereditaments, of which the rents or profits shall have been answered to Her Majesty or her predecessors or successors, or some other person under whom Her Majesty claimeth, or of any honour, manor, or other hereditaments which shall have been duly in charge to the Crown or stood *insuper* of record (1). And also that, in the construction of that Act and of the 9 Geo. III. c. 16, the right or title of the Crown to any manors or hereditaments comprised in any lease granted by the Crown, shall not be deemed to have first accrued until the expiration of such lease as against any person whose enjoyment of such hereditaments or whose receipt of the rents or profits thereof shall have commenced during the term of the lease, or who shall claim through any person whose enjoyment or receipt so commenced (2). Similar provisions with regard to Ireland are contained in the Act 39 & 40 Vict. c. 37.

In a case (3) which arose recently in Ireland under the first section of the last-named Act, it was pointed out that the language of the first part of that section (as well as of the corresponding English Act) differs from that of the first section of 48 Geo. III. c. 7, and only relates to actions “for or in any wise concerning any manors, lands, tenements, rents, tithes, or hereditaments whatsoever,” and does not extend to actions “for or in any wise concerning the revenues, issues or profits thereof;” therefore it was held (3) that a claim by the Crown for a quit-rent is not barred by non-payment for any time, if the original grant was inserted in the great roll of the

(1) Sect. 3.

(2) Sect. 4.

(3) *In re Maxwell's Estate*, 28 L. R. Ir. 356.

pipe, such a rent being duly in charge within the meaning of the third exception in 48 Geo. III. c. 47 (corresponding to the English Act 9 Geo. III. c. 16).

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By another Act of the present reign (1) similar limitations to those prescribed in the *Nullum Tempus* Act were enacted with respect to claims by the Duke of Cornwall to lands and other hereditaments within the county of Cornwall, other than liberties or franchises, and other than mines, minerals, stones, and *substrata* (2). It is further provided that the claims of the Duke of Cornwall to any mines, minerals, stones, or *substrata* in the county shall be barred by sixty years' possession of the land, if such mines, &c., have been substantially worked at any time during that period by the person in possession, and such mines, &c., have not been at any time during that period worked, or the tolls, dues, royalties, and other profits thereof received or enjoyed by the Duke of Cornwall or some person claiming under him (3). And the claims of the Duke to such mines, &c., are likewise barred by one hundred years' possession of the land, if during that period of one hundred years such mines, &c., have not been worked, or the tolls, &c., enjoyed by the Duke, or some person claiming under him (4). And the right of the Duchy to any navigable river, estuary, port, or branch of the sea, and the soil thereof, and to the shores between high and low water mark is excepted from the operation of the Act (5).

Duchy of
Cornwall.

The claims of the Duke of Cornwall have been further limited by the Act 23 & 24 Vict. c. 53. The preamble of this statute recites that the provisions of 7 & 8 Vict. c. 105 do not extend to claims to navigable rivers, estuaries, ports or branches of the sea, or the soil thereof, or the shores between high and low water mark, and that

23 & 24
Vict. c. 53.

- (1) 7 & 8 Vict. c. 105, ss. 71–88.
- (2) Sect. 71.
- (3) Sect. 73.
- (4) Sect. 74.
- (5) Sect. 86.

PART VII. it is expedient that as to hereditaments not within the
 CH. I.
 county of Cornwall, and also as to such hereditaments within the county as are excepted from the provisions of the former Act, the limitation applicable to actions and suits by the Crown should be made applicable to actions and suits by the Duke of Cornwall. It is accordingly enacted (1) that all the provisions of 9 Geo. III. c. 16, now applicable to the Crown, shall extend and be applicable to the Duke of Cornwall, as if the same were re-enacted, and the Duke of Cornwall were throughout mentioned and referred to, when the "King's Majesty," or "His Majesty," is in the said Act mentioned or referred to, subject to the sections of the 7 & 8 Vict. c. 105, concerning the putting in charge of lands in the Duchy (2). But the Act 23 & 24 Vict. c. 53 does not extend to property respecting which a limitation is provided by the earlier Act, nor does it affect the provisions of the Prescription Act (3), or of the Act for shortening the time in claims of *modus decimandi*, and exemption from tithes (4).

The provisions of the Act 24 & 25 Vict. c. 62, which have been already referred to as affecting the claims of the Crown, extend also to the claims of the Duke of Cornwall, with the exception of the section which provides that the Crown shall not be deemed to have been answered the rents or profits of any lands, &c., occupied by any other person for sixty years, by reason only of such lands being part of any manor, &c., of which the rents or profits have been answered to the Crown, and it was not necessary to extend this section to the Duchy of Cornwall, as a precisely similar section was contained in the 7 & 8 Vict. c. 105 (5).

It must be always recollected that all the property

(1) Sect. 1.

(2) Sects. 72, 75.

(3) 2 & 3 Wm. IV. c. 71.

(4) 2 & 3 Wm. IV. c. 100.

(5) Sect. 72.

belonging to the Duchy of Cornwall is not subject to the same enactments.

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The result of the various Acts would seem to be that claims of the Duchy to mines, minerals, stones, and *substrata*, not within the county of Cornwall, and to navigable rivers, &c., whether within or without the county, are affected by the *Nullum Tempus* Act, as amended by 24 & 25 Vict. c. 62, and subject to the 72nd and 75th sections of 7 & 8 Vict. c. 105; the rights of the Duchy to mines, &c., within the county of Cornwall only, being within the special provisions of the Act 7 & 8 Vict. c. 105, relating to that kind of property.

As liberties and franchises are excepted from the operation of the *Nullum Tempus* Act, as well as from that of 7 & 8 Vict. c. 105, it would seem clear that there is no statutory limitation to the title of the Duchy to liberties and franchises, whether within or without the county of Cornwall, any more than there is to the title of the Crown to them.

All other property of the Duchy not within the county of Cornwall is subject to the provisions of the *Nullum Tempus* Act as amended, and to the provisions of 7 & 8 Vict. c. 105, ss. 72 & 75.

CHAPTER II.

CRIMINAL PROCEEDINGS AND CROWN PRACTICE.

PART VII.
CH. II.Prosecu-
tions.

It has already been pointed out that, owing to the rule of law according to which time does not run against the Crown, prosecutions for felonies and misdemeanours may generally be commenced at any distance of time after the commission of the offence (1). There are, however, several cases in which the time for commencing prosecutions has been limited by statute.

Treason.

By 7 & 8 Wm. III. c. 3 no person may be indicted, tried, or prosecuted for any high treason whereby corruption of blood may be made, or for misprision of such treason committed within England, Wales, or Berwick-upon-Tweed, unless the indictment be found by the grand jury within three years after the offence (2); but if any person be guilty of designing, endeavouring or attempting any assassination on the body of the king by poison or otherwise, such person may be prosecuted at any time (3). This limitation, it would seem, is extended to similar cases of treason committed in Scotland by 7 Anne, c. 21 (4), and is expressly extended to Ireland by 1 & 2 Geo. IV. c. 24; but it does not extend to acts done in foreign parts, or on the high seas.

Treason
felony.

The Act 11 & 12 Vict. c. 12, which makes it felony to compass the deposition of the Queen, or the intimidation of the Queen, or parliament, or the stirring up of for-

(1) See *ante*, p. 516.

(2) Sect. 5.

(3) Sect. 6.

(4) Foster (Sir Michael), C. C. 249.

eigners to invade Her Majesty's dominions, provides (1) that no person shall be prosecuted for any felony by virtue of that Act in respect of such compassings, &c., in so far as the same are declared by open and advised speaking only, unless information be given upon oath within six days after the words shall have been spoken, and unless a warrant for the apprehension of such person be issued within ten days after such information given, "*and* unless such warrant shall be issued within two years after the passing of this Act." In this last proviso "*and*" has probably been inserted by mistake for "*or*." If the words of the clause be taken literally as they at present stand, no prosecution for such a felony, if expressed by speaking only, could now be commenced at all.

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CH. II.
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By 60 Geo. III. and 1 Geo. IV. c. 1, the Act to prevent training persons to the use of arms and to the practice of military evolutions and exercises, it is enacted that no person shall be prosecuted for anything done contrary to that Act, unless such prosecution be commenced within six calendar months after the offence committed (2).

Training
persons to
the use of
arms.

The 120th section of 3 & 4 Wm. IV. c. 53 (now repealed) provided that all suits, indictments, or informations for any offence against that or any other Act relating to the Customs in any of Her Majesty's Courts of Record at Westminster or in Dublin or in Edinburgh or in the royal courts of Guernsey, Jersey, Alderney, Sark, or Man, must be commenced within three years next after the date of the offence committed, and before any justice of the peace within six months next after the date of the offence committed. This limitation was held not to apply to an indictment at the assizes for a conspiracy to defraud the Queen of certain duties, such a conspiracy being an offence at Common Law, and the court in which the indictment was preferred not being one of the courts

Offences
against
Customs
Acts.

(1) Sect. 4.
(2) Sect. 7.

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CH. II.
—

mentioned in the section (1). But by the "Customs Consolidation Act, 1876" (2), it is enacted that "All suits, indictments, or informations brought or exhibited for any offence against the Customs Acts in any Court, or before any justice, shall be brought or exhibited within three years next after the date of the offence committed."

Night
poaching.

By 9 Geo. IV. c. 69, the Act for the more effectual prevention of persons going armed by night for the destruction of game, prosecutions for every offence punishable upon indictment or otherwise than upon summary conviction by virtue of that Act must be commenced within twelve calendar months after the commission of the offence (3). And this limitation must, it seems, be applicable to unlawfully taking game on a road or highway under 7 & 8 Vict. c. 29, as that Act only operates by extending the provisions of 9 Geo. IV. c. 69.

Criminal
Law
Amend-
ment Act,
1885.

By sect. 5 of the Criminal Law Amendment Act, 1885 (4), no prosecution for unlawfully and carnally knowing or attempting to have unlawful carnal knowledge of any girl of or above the age of thirteen years and under the age of sixteen can be commenced more than three months after the commission of the offence.

What is
the com-
mencement
of a pro-
secution?

In a case where persons were prosecuted and convicted under 9 Geo. IV. c. 69, the information was laid before justices and a warrant for the apprehension of the defendants issued within a year of the commission of the offence, but the indictment was not preferred till after the year had expired. The judges were unanimously of opinion that the conviction was right (5). And where the defendant was taken before a magistrate, and a warrant of commitment granted within the year, and such warrant was produced in court, Pollock, C.B., held that the prosecution

(1) *Reg. v. Thompson*, 20 L. J. M. C. 183; 16 Q. B. 832.

(2) 39 & 40 Vict. c. 36, s. 257.

(3) Sect. 4; see 47 & 48 Vict. c. 43, s. 4.

(4) 48 & 49 Vict. c. 69.

(5) *Reg. v. Brooks*, 1 Den. C. C. 217.

was shown to have been commenced in time (1). In another case on the same statute a warrant for the defendant's apprehension had been issued within a week after the commission of the offence, but was not served owing to the defendant's having absconded. On the defendant's return after an absence of six years an indictment was preferred against him, and at the trial the original warrant for his apprehension was tendered in evidence. The attention of Pollock, C.B., was called to the cases above quoted, but he was of opinion that none of them went to the extent contended for in the case before him, and that the issuing of the original warrant was not a commencement of proceedings within the statute (2). It is not clear from the report in what way the case was distinguished from that of *Reg. v. Brooks*, above referred to; the difference, however, was probably this, that in the case of *Reg. v. Hull* the defendant was not apprehended under the warrant first issued, but under another warrant issued upon an information laid after his return, so that in fact the prosecution at the Assizes was not a continuation of the proceedings which were commenced within the year, but that in the case of *Reg. v. Brooks* the prosecution, which began by the laying of the information within the year, was carried on continuously till the defendant's conviction (3). When an indictment preferred within the year was thrown out by the grand jury, and another indictment was preferred after the expiration of the year, Coleridge, J., refused to stop the case, on the ground that the prosecution was not commenced in time, but reserved the point, considering it one open to much doubt (4). The question raised in that case was not decided, the defendant being acquitted on the merits. Under an Act (5), now repealed, against counterfeiting

(1) *Reg. v. Austin*, 1 C. & K. 621.

(2) *Reg. v. Hull*, 2 F. & F. 16.

(3) See *Rex v. Wallace*, 1 East, P. C. 186.

(4) *Rex v. Killminster*, 7 C. & P. 228.

(5) 8 & 9 Wm. III. c. 26.

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coin which required prosecutions under its provisions to be commenced within three months after the offence committed, an indictment was preferred after that period had elapsed. Parol evidence was given that the prisoners were apprehended within the three months, but no warrant of apprehension or commitment was produced. The judges were of opinion that there was not sufficient evidence that the prisoners were apprehended upon transactions respecting coin within three months after the offence committed (1).

Summary
proceedings
before
justices.

By virtue of 11 & 12 Vict. c. 43 (2) summary proceedings before justices, whether under then existing or subsequent Acts, must, in the absence of any special limitation, be instituted within six calendar months from the time when the matter of the complaint or information arose (3). Informations for forfeitures on penal statutes were included in 31 Eliz. c. 5 (4), the part of which relating to the time limited for exhibiting an information on any penal statute is repealed by the 36th section of 11 & 12 Vict. c. 43 (5); but this repeal extends, it would seem, only to informations before justices. Many statutes which impose penalties recoverable by summary proceedings before justices impose special periods of limitation shorter than that prescribed by 11 & 12 Vict. c. 43 (6).

In *Jacomb v. Dodgson* (7) it was held that proceedings before justices to recover from adjoining owners their share of the expenses of making a new street under 21 & 22 Vict. c. 98, s. 63, might be commenced at any time within six months after the expiration of the three months during which the surveyor's apportionment might be disputed.

(1) *R. v. Phillips*, Russ. & Ry. C. C. 369.

(2) Sect. 11; see *Jacomb v. Dodgson*, 3 B. & S. 461; 32 L. J. M. C. 113; and see 12 & 13 Vict. c. 103, s. 9.

(3) See *Guardians of Ulverstone v. Park*, 53 J. P. 629.

(4) See *ante*, Part VI. p. 511.

(5) Since repealed. See 38 & 39 Vict. c. 66.

(6) *E.g.* 41 Vict. c. 16, s. 91, sub-sect. (1), and 54 & 55 Vict. c. 75, s. 29.

(7) 3 B. & S. 461; 32 L. J. M. C. 113.

By the Public Health Act, 1848 (1), a local board could recover the apportioned shares of expenses of making a street from adjoining owners in a summary manner before justices; the period within which such expenses could be recovered was therefore by 11 & 12 Vict. c. 43. limited to six months after the expiration of the three months during which the apportionment could be disputed. By sect. 24 of the Local Government Act (1858) Amendment Act, 1861 (2), proceedings for the recovery of demands of this nature below £20 might be taken by a local board in a county court. It was held that the limitation of six months applied to proceedings in the county court as well as to proceedings before justices (3). But this limitation does not apply to the enforcing of a charge on the premises under sect. 257 of the Public Health Act, 1875 (4). Such a charge may be enforced although the time has gone by for summary proceedings (5). The charge is imposed on the premises as soon as the work is completed (6). But where a local board had allowed six months to pass by after notice of demand without taking proceedings and the owner of the property had died, it was held that the board could not prove as creditors in a suit for the administration of the estate of the owner, the sum claimed not being a debt but a liability which could only be enforced in the manner prescribed by statute, and which was barred at the expiration of six months (7).

By sect. 62 of the Local Government Act, 1858 (8), it was enacted that "in all summary proceedings by a local board for the recovery of expenses incurred by

(1) 11 & 12 Vict. c. 63, s. 69.

(2) 24 & 25 Vict. c. 61.

(3) *West Ham Local Board v. Maddams*, 33 L. T. N. S. 809; *Tottenham Local Board v. Rowell*, 1 Exch. D. 514.

(4) 37 & 38 Vict. c. 55; *Tottenham Local Board v. Rowell*, 15 Ch. D. 378.

(5) *Corporation of Sunderland v. Alcock*, 51 L. J. Ch. 546.

(6) *In re Bettesworth & Richer*, 37 Ch. D. 535; *Hornsey Local Board v. Monarch Investment Building Society*, 24 Q. B. D. 1.

(7) *West v. Downman*, 14 Ch. D. 111.

(8) 21 & 22 Vict. c. 98.

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them in works of private improvement, the time within which such proceedings might be taken should be reckoned from the date of the service of the notice of demand." It was held that, before proceedings could be taken under the Public Health Act, 1848, and the Local Government Act, 1858, a demand of payment was necessary, and that the notice of apportionment required by the Local Government Act, 1858, was not a sufficient demand, and that the six months did not begin to run till a demand of payment had been made (1). This decision has been followed in a case which arose under the corresponding sections (sects. 158 and 257) of the Public Health Act, 1875 (2).

Where there is a dispute about the apportionment under sect. 150 of the Public Health Act, 1875, a local board cannot proceed in a summary manner before justices, or in a county court under sect. 261 of that Act, until the dispute is settled by arbitration (3).

By sect. 252 of the Public Health Act, 1875, any complaint or information in pursuance of the Act must be laid within six months from the time when the matter of such complaint or information respectively arose; under sect. 257 the matter of complaint does not arise until notice of demand of payment of the sum apportioned has been served after the expiration of three months from the notice of apportionment (2). If the complaint is preferred before justices within the six months, even a year's delay in taking out a summons will not affect the validity of the proceedings (2).

Proceedings taken under sect. 156 of the Public Health Act, 1875, to recover a penalty for building beyond the line of frontage in a street, are criminal proceedings. The Court will, therefore, not grant an

(1) *Grece v. Hunt*, 2 Q. B. D. 389.

(2) *Simcox v. Handsworth Local Board*, 8 Q. B. D. 39.

(3) *Sandgate Local Board of Health v. Keene* (1892), 1 Q. B. 831.

injunction to restrain a local board from taking such proceedings, on the ground that they are too late (1). PART VII.
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In another case against the owner of a house under the same section, for bringing forward a house beyond the frontage of the adjoining houses and continuing the offence after notice from the urban sanitary authority, it was held that the offence was a continuing one, so long as the addition was maintained after notice, and that proceedings might be taken within six months of the offence so continuing (2).

In summary proceedings under the Highways and Locomotives Amendment Act, 1878 (3), for the recovery of extraordinary expenses incurred in repairing a highway by reason of extraordinary traffic, the limitation of six months under 11 & 12 Vict. c. 43, s. 11, runs from the date of the certificate of the surveyor, and not from the damage done to the highway or from the demand (4). Expenses of
extraor-
dinary
traffic on
highways.

The limitation of six months under 11 & 12 Vict. c. 43, for the recovery by summary proceedings under the Metropolitan Building Act, 1855 (5), of expenses incurred in taking down and securing dangerous structures, runs from the demand and refusal of payment and not from the incurring of the expenses (6).

There is no statutory enactment limiting the time within which criminal informations may be applied for. Lord Mansfield thus lays down the rule as to the time for making such applications: "As to this there is no precise number of weeks, months, or years. But, if delayed, the delay must be reasonably accounted for" (7). Before the Judicature Act, 1873, if the application had been made so late in the second term after the offence Criminal
informa-
tions.

(1) *Kerr v. Corporation of Preston*, 6 Ch. D. 463.

(2) *Rumball v. Schmidt*, 8 Q. B. D. 603.

(3) 41 & 42 Vict. c. 77, ss. 23 & 36.

(4) *Pool & Forden Highway Local Board v. Gunning*, 51 L. J. M. C. 49.

(5) 18 & 19 Vict. c. 122, ss. 73 & 97 (6).

(6) *Labalmondiers v. Addison*, 1 E. & E. 41; 28 L. J. M. C. 25.

(7) *Rex v. Robinson*, 1 W. Bl. 542.

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committed, that the defendant could not show cause within that term, the application would not have been granted, unless there was some reason to account for the delay (1). It was sufficient explanation of delay in applying for a criminal information for a libel, that the libel did not come to the prosecutor's knowledge till shortly before the application (2). But such delay was not sufficiently accounted for by the mere fact that the prosecutor was abroad at the time of the publication of the libel (3).

Against
justices of
the peace.

In the case of criminal informations against justices of the peace for improper conduct in their office, it was, before the Judicature Act, 1873, an established rule that the application must be made in time to give the defendants an opportunity of showing cause against the rule before the end of the second term after the date of the conduct alleged (4). And the same rule was extended to other public officers (5). In these cases delay in making the application was not excused on the ground that the facts had only lately come to the prosecutor's knowledge (6).

Abolition
of terms.

By sect. 26 of the Judicature Act, 1873 (7), the division of the legal year into terms is abolished so far as regards the sittings of the Courts, but terms may still be used as a measure for determining the time at or within which any Act is required to be done, unless and until provision is otherwise made by lawful authority. By the Crown Office Rules, 1886 (r. 48), it is provided that an application for a criminal information must be made within a reasonable time after the offence complained of.

(1) *Rex v. Jollie*, 4 B. & Ad. 867; and see *Rex v. Murray*, 1 Jur. 37.

(2) *Rex v. Jollie*, *ubi supra*.

(3) *Rex v. Barry O'Meara*, 4 B. & Ad. 869, n.; *Rex v. Editor of Satirist*, 3 N. & M. 532.

(4) *Rex v. Harries*, 13 East, 270; *Rex v. Marshall*, *ib.* 322.

(5) *Rex v. Hartley*, 4 B. & Ad. 869, n.

(6) *Rex v. Bishop*, 5 B. & Ald. 612.

(7) 36 & 37 Vict. c. 66.

Therefore it would seem that the old rule as to terms is no longer applicable, but, in deciding what is a reasonable time after the offence complained of, the old cases as to delay will probably be considered.

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By sect. 51 of the Corrupt and Illegal Practices Prevention Act, 1883 (1), a proceeding against a person in respect of any of the offences under the Corrupt Practices Prevention Acts, 1854 to 1883, must be commenced within one year after the offence committed, or, if committed in reference to an election with respect to which an enquiry is held by election commissioners, within one year after the offence was committed, or within three months after the report of such commissioners is made, whichever period last expires, so that it be commenced within two years after the offence was committed. The commencement of a proceeding is defined to be the issue of a summons, writ, warrant or other process, where the service or execution of the same is prevented by the absconding or concealment or act of the alleged offender, but in all other cases the service or execution of the summons, writ, warrant or other process.

Corrupt
practices.

By sect. 225 of the Municipal Corporation Act, 1882 (2), it is enacted that an application for an information in the nature of a *quo warranto* against any person claiming to hold a corporate office shall not be made after the expiration of twelve months from the time when such persons became disqualified after election. The corresponding section of the repealed Act 7 Wm. IV. and 1 Vict. c. 78 (3) enacted that the application should be made before the end of twelve months after the election, or from the time when the person should have become disqualified; it was decided under this section that, where a member of a town council had entered into a contract with the council, there was a disqualification

Quo
warranto.

- (1) 46 & 47 Vict. c. 51.
- (2) 45 & 46 Vict. c. 50.
- (3) Sect. 23.

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arising from day to day as long as the contract continued, and that the application for a *quo warranto* could be made more than a year after the time when the disqualification commenced (1). In another case (2) under the same statute it was held that, when an alderman ceased to occupy premises within the borough and thereby became disqualified, an application for a *quo warranto* was too late when made more than twelve months after he had ceased to be qualified, although within twelve months of his being struck off the burgess list. It would seem that the result of the wording of sect. 225 of the Municipal Corporations Act, 1882 (3), is that time begins to run from the beginning of a disqualification, even though it be a continuing one.

Municipal
election
petitions.

By sect. 88 of the Municipal Corporations Act, 1882 (3), an election petition in the case of a municipal election must be presented within twenty-one days after the day on which the election was held; but, if the petition questions the election on the ground of corrupt practices, and specifically alleges that a payment of money or other reward had been made or promised since the election by a person elected or on his account or with his privity in pursuance or furtherance of such corrupt practices, it may be presented at any time within twenty-eight days after the date of the alleged payment or promise, whether or not any other petition against that person has been previously presented or tried (4). By sect. 73 of the same Act, every municipal election not called in question within twelve months after the election, either by election petition or by information in the nature of a *quo warranto*, shall be deemed to have been to all intents a good and valid election. But, although an election may be, by virtue of sect. 73, a good and valid

(1) *Reg v. Francis*, 21 L. J. Q. B. 304.

(2) *Ex parte Birkbeck*, L. R. 9 Q. B. 256.

(3) 45 & 46 Vict. c. 50.

(4) See, as to election petitions on the ground of illegal practices, 47 & 48 Vict. c. 70, s. 25.

election, yet the person elected may, after the lapse of twelve months after his election, still be liable to penalties, if he acts in a corporate office without being qualified, or after ceasing to be qualified, or after becoming disqualified (1).

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The Acts 32 Geo. III. c. 58 and 1 Vict. c. 78, which provided a period of limitation for application for *quo warranto*, have now been repealed (2).

The procedure in reference to petitions questioning parliamentary elections is governed by the Acts 31 & 32 Vict. c. 125, s. 6, and 46 & 47 Vict. c. 51, s. 40. Where an election petition questions the return or the election upon an allegation of an illegal practice, the petition must be presented before the expiration of fourteen days after the day on which the returning officer receives the return and declarations respecting election expenses by the member whose election is questioned and his election agent; if the petition specifically alleges a payment of money or some other act to have been made or done since the said day by the member or an agent of the member, or with the privity of the member or his election agent in pursuance or in furtherance of the illegal practice alleged in the petition, the petition may be presented at any time within twenty-eight days after the date of such payment or other act. The time for presenting an election petition in other cases is fixed by sect. 6 of 31 & 32 Vict. c. 125, which requires that the petition must be presented within twenty-one days after the return has been made to the clerk of the Crown in Chancery in England or to the clerk of the Crown and Hanaper in Ireland of the member to whose election the petition relates, unless it questions the return or election upon an allegation of corrupt practices and specifically alleges a payment of money or other reward to have been made by any member or on his account, or with his privity,

Parlia-
mentary
election
petitions

(1) *De Souza v. Cobden* (1891), 1 Q. B. 687.

(2) See 50 & 51 Vict. c. 59; 45 & 46 Vict. c. 50, s. 5.

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since the time of such return in pursuance of or in furtherance of such corrupt practices, in which case the petition may be presented at any time within twenty-eight days after the date of such payment. It has been decided under sect. 6 of 31 & 32 Vict. c. 125, that the return is not made to the clerk of the Crown, until it comes into his hands, so that he may act upon it, and that, where the return was delivered at the office after office hours, the twenty-one days were not to be reckoned till the next business day (1).

Certiorari.

By sect. 33 of the Crown Office Rules, 1886, which substantially re-enacts the 5th section of 13 Geo. II. c. 18 (now repealed (2)), no writ of *certiorari* shall be granted to remove any judgment, order, conviction or other proceeding had before any justice or justices of any county, city, borough, town corporate, or liberty, or the general or quarter sessions thereof, unless applied for within six calendar months next after such conviction, &c., so had, and unless it be proved by affidavit that the party suing forth the same has given six days' notice thereof in writing to the justice or justices or two of them, before whom such conviction, &c., was had.

These provisions of 13 Geo. II. c. 18 did not extend to indictments found at quarter sessions (3). It was decided under 13 Geo. II. c. 18, that the Crown is not affected by the limitation, and therefore that the Crown may apply through the Attorney-General after the six months have elapsed (4). And this, it seems, is still the case, for although the Act 44 & 45 Vict. c. 59, s. 6, provides that "the enactments relating to the making of rules of Court contained in the Supreme Court of Judicature Act, 1875, shall extend and apply to proceedings by or against the Crown," yet the Crown Office Rules, 1886, do not affect to bind the Crown.

(1) *Hurdle v. Waring*, L. R. 9 C. P. 435.

(2) See 51 Vict. c. 3.

(3) *Rex v. Battams*, 1 East, 298.

(4) 1 East, 303, n.

Where a *certiorari* to remove a conviction was applied for more than six months after the conviction, but less than six months after the magistrate's order by which the defendants were required to pay the penalties, it was held, under 13 Geo. II. c. 18, that the application was not made in time (1). If the order sought to be removed be made subject to a case, the six months must be calculated from the making of the order without regard to any delay that may have occurred in drawing up the case (2). Under 13 Geo. II. c. 18, the Court had no power to excuse a person from complying with the Act, whatever might have been the cause of the delay (3). But by the Crown Office Rules, 1886, r. 297, power is given to enlarge the time (4).

If a conviction or other order of the justices is appealed against, and confirmed, or by statute requires confirmation at quarter sessions, a *certiorari* may be moved for at any time within six months after the conviction or order has been confirmed (5).

The day on which the order sought to be removed by *certiorari* is made is excluded in computing the six months (6).

A conviction having taken place on the 23rd of February, the last day for applying for a *certiorari* was Saturday, August the 22nd. On the 15th August notice was given to the convicting justices that an application would be made for a *certiorari* on the 22nd. During that month the vacation judge attended at chambers on Tuesday and Friday only. On Friday the 21st the defendant's attorney attended at the judge's chambers and left affidavits to be laid before the judge, and the

(1) *Rex v. Boughey*, 4 T. R. 281.

(2) *Rex v. Justices of Sussex*, 1 M. & S. 631; *Rex v. Bloxam*, 1 A. & E. 386; *Elliot v. Thompson*, 33 L. T. 339.

(3) *Rex v. Bloxam*, *ubi supra*.

(4) See Short and Mellor. Practice of the Crown Office, p. 124, n.

(5) *In re Kaye*, 1 D. & R. 436; *Rex v. Justices of Middlesex*, 5 A. & E. 626.

(6) *Reg. v. St. Mary, Whitechapel*, 2 Dowl. P. C. N. S. 964.

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next day he called and was informed that the affidavits were still before the judge. It was held that the application was made on Saturday the 22nd within the meaning of the 5th section of 13 Geo. II. c. 18 (1).

Where the writ had been applied for in time, and the *certiorari* had afterwards been allowed upon an insufficient recognisance, the Court refused to quash the writ, but quashed the allowance, and ordered the return to be enlarged and the writ sent back to sessions, in order that it might be properly allowed (2). If a *certiorari* be applied for within the six calendar months and granted, it does not become invalid by reason that it is not used for a long time afterwards (3). But if the writ be granted and quashed for insufficiency of affidavits, a second application cannot be made after the six months have elapsed (4). Nor after the expiration of that period will the Court allow defects in the original affidavits to be supplied by fresh affidavits to prevent a writ of *certiorari* being quashed (5).

Rule 33 of the Crown Office Rules, 1886, like sect. 5 of the 13 Geo. II. c. 18, only applies to convictions and other proceedings before justices, and in other cases there is no rule of practice limiting the time for applying for a *certiorari*. The Court will judge of the reasonableness of the time of application, looking at all the circumstances of the particular case (6). In cases where there is no statutory limitation to the application for a *certiorari*, the Court will refuse it, if the applicant lies by and does not make his application with due diligence (7).

By 7 Wm. IV. and 1 Vict. c. 69, s. 3, a judgment of the

Decision of
Tithe and
Inclosure
Commissioners.

(1) *Reg. v. Allan*, 4 B. & S. 915; see *Rex v. Abergele*, 5 A. & E. 796, n. a.

(2) *Rex v. Abergele*, 5 A. & E. 795.

(3) 5 A. & E. 799.

(4) *Reg. v. Inhabitants of Cartworth*, 8 Jur. 61.

(5) *Reg. v. Inhabitants of Gilberdike*, 5 Q. B. 207.

(6) *Reg. v. Mayor of Sheffield*, L. R. 6 Q. B. at p. 654.

(7) *Reg. v. Commissioners of Sewers for the Tower Hamlets*, 5 Q. B. 357.

Tithe Commissioners respecting parish boundaries cannot be removed by *certiorari*, unless the writ be moved for within six calendar months after publication of such boundaries. And the like term is limited for the removal by *certiorari* of a decision of the Inclosure Commissioners as to the boundaries of manors and parishes (1).

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Sect. 40 of the Metropolis Valuation Act, 1869 (2), enacts that the same proceedings may be had by special case and *certiorari* or otherwise for questioning any decision of the justices in assessment sessions as may be had for quashing any decision of the justices in general or quarter sessions, provided that every such *certiorari* shall be sued out within three months after the decision is given. It is doubtful whether this limitation of time is at all affected by the Crown Office Rules, 1886, r. 33 (3).

By 12 & 13 Vict. c. 103, s. 13, an order, rule, or regulation of the Poor Law Commissioners, or of the Local Government Board (4), cannot be removed by *certiorari*, unless the *certiorari* be moved or applied for within twelve months next after the day when the copy thereof shall be sent, in the manner required by the several statutes in that behalf.

Decision of
Local Go-
vernment
Board.

There is no statutory limit for the application for the Prerogative Writ of *Mandamus*. It appears to be entirely within the discretion of the Court, within what time it will be granted, but it must be applied for within a reasonable time (5). Where by a charter power was given to a corporation to hold a Court for the trial of small causes, the disuse of the Court for two hundred years was held no answer to a rule for a mandamus to the corporation to hold it (6). Whether there is any limitation to an action for mandamus has been discussed above (7).

Mandamus.

To hold an
obsolete
Court.

(1) 8 & 9 Vict. c. 118, s. 44.

(2) 32 & 33 Vict. c. 67.

(3) But see Short and Mellor's Crown Practice, p. 124, n.

(4) See 34 & 35 Vict. c. 70, § 2.

(5) Short and Mellor's Crown Practice, p. 33.

(6) *Rex v. Mayor and Corporation of Wells*, 4 Dowl. 562.

(7) Part I. Ch. I. p. 13.

PART VIII.

PLEADINGS AND PROCESS.

CHAPTER I.

PLEADING THE STATUTES.

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CH. I.

The statute
must be
pleaded in
personal
actions.

Except
penal
actions.

THE effect of those Statutes of Limitations which relate to personal actions, other than actions on penal statutes, is not to extinguish the cause of action, but to bar the right to maintain such action. The defence of the statute in such cases must be specially pleaded, even if it appears on the face of the statement of claim that the cause of action accrued out of the limited time (1).

However, in penal actions limited by 31 Eliz. c. 5 the defendant was allowed to take advantage of the statute under a plea of the general issue (2). This Act, it must be remembered, was held not to apply to actions by the party grieved (3). The ground of the distinction as to the rule of pleading the statute specially is said to be that in the case of other Statutes of Limitation the plaintiff had a right of action vested in him before suit, which is not extinguished by the statutes, while in penal actions the duty or right of action merely attaches in the plaintiff by

(1) *Stile v. Finch*, Cro. Car. 381; *Hawkings v. Billhead*, *ib.* 404. And see now R. S. C. 1883, O. XIX. r. 15; R. S. C. Ir. 1891, O. XIX. r. 16.

(2) Notes to *Hodsdon v. Harridge*, 2 Wms. Saund. 159.

(3) Noy's Rep. 71.

his bringing his action, and did not exist in him before, and, unless he brings his action within the time prescribed, there is no right of action ever vested in him (1). In fact in this case the informer has not, like other plaintiffs, a right independent of his action, and for which the action is only a remedy, but his right is merely to bring an action and therefrom to get a benefit which is appended to the prosecution of such an action. If, therefore, the informer's right to bring an action is taken away at the end of a certain time, he has, after that time, no claim or right of any kind.

By 21 Jac. I. c. 4, s. 4, a defendant in any action brought under any previous penal statute might, under a plea of the general issue, take advantage of any special defence, including, of course, a defence founded on the statute 31 Eliz. c. 5, and it seems that this section of the Act of Jac. I. extended to subsequent penal laws (2).

In actions of debt, when the general issue was "*nil debet*," it was at one time considered that under that plea the defendant might take advantage of the statute, and need not plead specially that the action was not brought in time (3). But the later practice and authorities were in favour of pleading the statute in this case (4). So, in answer to a plea of set-off, the statute had to be specially pleaded and could not be taken advantage of under the general replication of "*nil debet*" (5). The defence of the statute was certainly not admissible under the plea of "*nunquam indebitatus*," which by the Common Law Procedure Act, 1852, was substituted as the general issue in such actions (6), and under the practice since the Judicature Acts, where it is wished to take advantage of the

Action of
debt.

(1) 2 Wms. Saund. 162.

(2) See judgment in *Earl Spencer v. Swannell*, 3 M. & W. 154, at p. 161; Bullen & Leake's Precedents of Pleading, 3rd ed. p. 704.

(3) Notes to *Duppa v. Mayo*, 1 Wms. Saund. 430, n. (7).

(4) 1 Wms. Saund. *ubi supra*.

(5) *Chapple v. Durston*, 1 C. & J. 1.

(6) C. L. P. Act, 1852 (15 & 16 Vict. c. 76), s. 91, sched. B.

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statute, it must in all actions of debt be pleaded, except where the plea of the general issue by statute is admissible (1).

General
issue by
statute.

Where a statute provides a special limitation for actions brought against persons for acts done under it, and provides that special defences may be proved under a plea of the general issue, a defendant may avail himself of the defence that the action is not brought within the time specially limited, under the plea of not guilty by statute (2). The plea of the general issue is in most cases no longer available, although in actions for the recovery of land the plea of possession is in effect a plea of the general issue (3); yet the right to plead the general issue when given by statute is still preserved (1).

Ejectment.

In the old form of actions of ejectment, before pleadings in that action were abolished, it was not necessary for the defendant to plead the statute 21 Jac. I. c. 16, s. 1. But the lessor of the plaintiff was bound to give evidence of title to the possession within twenty years, although the general issue only were pleaded (4). In actions for recovery of land, which have now taken the place of the old actions of ejectment but retain many of its peculiarities (5), pleadings have been re-introduced. As the effect of the statute 3 & 4 Wm. IV. c. 27, as amended by 37 & 38 Vict. c. 57, is not only to bar the right to bring an action to recover land at the end of twelve years' dispossession, but also to extinguish the title of the dispossessed owner at the end of that term, the plaintiff in an action for the recovery of land must on the face of his pleading show, and must at the trial prove, a legal title to the possession not barred by statute. A statement of

(1) R. S. C. 1883, O. XIX. r. 12, XXI. r. 19; R. S. C. Ir. 1891, O. XIX. r. 13, O. XXI. r. 19.

(2) *Bailey v. Warden*, 4 M. & S. 400, 407; and see *Whitehouse v. Fellowes*, 10 C. B. N. S. 765.

(3) See R. S. C. 1883, O. XXI. r. 21; R. S. C. Ir. 1891, O. XXI. r. 21.

(4) Adams on Eject. 2nd ed. p. 241, 3rd ed. p. 270.

(5) See *Gledhill v. Hunter*, 14 Ch. D. 492.

claim in such an action, which does not on the face of it show a legal title to the possession not barred by statute, was formerly demurrable, and may now be struck out under R. S. C. 1883, O. xxv. r. 4 (1). The defendant in such an action need not plead the statute, but may simply plead that he is in possession (2). In actions in which the title to land incidentally comes in question, as, for instance, in cases of trespass to land, there is no reason for specially setting up the statute, the proper mode of taking advantage of it being by a pleading which denies that the land belongs to the party dispossessed (3). There may, however, be cases where in such actions the statute may with advantage be specially pleaded, as, for instance, in an action of trespass in reply to a plea justifying under a grant, where the case of the plaintiff is that the grant is more than twelve years old, and that the defendant never went into possession under it, and that therefore his title was extinguished before the trespass was committed (4).

The proper form of plea by which to take advantage of any of the Statutes of Limitations in actions or contracts under the Common Law Procedure Act, 1852 (5), was “that the alleged cause of action did not accrue within (six years) before this suit.” The sections of the Common Law Procedure Act, 1852, which relate to pleading are now repealed (6), and the rules as to pleading are now to be found in R. S. C. 1883, O. xix., xx., and xxi. (7). Four forms of the defence of the statute are given in the Appendix to the R. S. C. 1883 (8): one

Form of
plea.

(1) *Dawkins v. Lord Penrhyn*, 4 App. Cas. 51; *Philipps v. Philipps*, 4 Q. B. D. 127; see R. S. C. Ir. 1891, O. xxv. r. 4.

(2) R. S. C. 1883, O. xxi. r. 21; R. S. C. Ir. 1891, O. xxi. r. 21; *Heath v. Pugh*, 6 Q. B. D. per Lindley, J. at p. 353.

(3) *De Beauvoir v. Owen*, 16 M. & W. 547; 5 Ex. 166.

(4) *Keyse v. Powell*, 2 E. & B. 132; 22 L. J. Q. B. 305; see above, Part V. Ch. III. p. 298.

(5) 15 & 16 Vict. c. 76, Sched. B.

(6) See 46 & 47 Vict. c. 49.

(7) See R. S. C. Ir. 1891, O. xix.-xxi.

(8) App. D. See R. S. C. Ir. 1891, App. D.

PART VIII. in an administration action—"The claim is barred by the
 CH. I. Statute of Limitations;" one in a foreclosure action—
 "The debt is barred by the Statute of Limitations;"
 one in a redemption action—"The plaintiff's right to
 redeem is barred by the Statute of Limitations;" and
 one in actions included in O. III. r. 6—"The debt *was*
(sic) barred by the Statute of Limitations (*state which*)."
 The defence of the statute should now, it seems, be as
 near to one of these forms as possible (1).

Set-off. Under the old system of pleading, if a set-off was
 pleaded by way of defence to an action, it was necessary
 that a reply of the statute should allege that the cause
 of action on which the defendant relied did not arise
 within six years of the commencement of the plaintiff's
 action; a reply that the cause of action did not arise
 within six years of the plea of set-off was bad (2).
 Although the form of the plea of the statute is now
 different, yet there is no doubt that if the statute is
 pleaded to a defence of set-off, the plaintiff, in order to
 establish his plea of the statute, must prove at the trial
 that the set-off was barred at the time when the plaintiff
 commenced his action (3). And the same principle
 would seem to apply to the case of a counterclaim.
 When issue is joined on a plea of the statute, the
 burden of proving that the cause of action arose within
 the statutory period lies on the plaintiff (4).

Reply of disability. A traverse of the plea of the statute only puts in issue
 the time at which the cause of action accrued; therefore,
 if the plaintiff rely upon the existence of any disability
 as taking the case out of the statute, he must reply such
 disability specially; and the reply should aver not only
 the existence of the disability at the time of action

(1) See R. S. C. 1883, O. XIX. r. 5; R. S. C. Ir. 1891, O. XIX. r. 5.

(2) *Walker v. Clements*, 15 Q. B. 1046. *Ord v. Ruspini*, 2 Esp. 569.

(3) *Walker v. Clements*, *ubi supra*. See *In re Ballard*. *Lovell v. Forester*, W. N. 1890, 64.

(4) *Wilby v. Henman*, 2 C. & M. 658; *Beale v. Nind*, 4 B. & Ald. 571; *Hurst v. Parker*, 1 B. & Ald. 92.

brought, but also that the action was commenced within the proper period of the termination of the disability, or while the disability was still subsisting (1).

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If the plaintiff to a plea of the statute replies alleging a disability, a rejoinder is bad which does not deny that the action was commenced within six years of the cessation of the disability; a rejoinder is also bad to such a reply, if the rejoinder amounts to a denial of the plaintiff's cause of action; a plea of the statute admits the plaintiff's right to sue, but alleges that the remedy is barred by lapse of time (2); any matter that amounts to a denial of the plaintiff's right must be pleaded in the defence, and cannot be taken advantage of in rejoinder (3).

It has already been pointed out that in cases of simple contract debts the liability may be revived by a promise to pay; and a promise to this effect is evidenced by an acknowledgment in writing or part payment. Such a promise is not a waiver of the statute, but a new cause of action; and therefore, if made within six years of action brought, it may be proved under a reply joining issue on a defence of the statute. It seems that before the Judicature Acts a replication that there had been a part payment within six years was not a good answer to a plea of the statute; for such a payment is only evidence from which a promise may be inferred, and that inference the Court could not draw (4). Now it would seem that such a plea would be bad as a violation of the rule that evidence is not to be pleaded (5).

Acknowledgments need not be replied specially.

When a plea of the statute is traversed, the question raised is whether the cause of action laid in the statement of claim arose within six years, and therefore the

(1) See 1 Chitty's Plead. 3rd. ed. 475; Bullen and Leake Plead. 2nd. ed. 544, 3rd ed. 645.

(2) See *Margetts v. Bays*, 4 A. & E. 489.

(3) *Scarpellini v. Atcheson*, 7 Q. B. 864.

(4) *Ridd v. Moggridge*, 2 H. & N. 567; see *Tanner v. Smart*, 6 B. & C. 607.

(5) R. S. C. 1883, O. XIX. r. 4; R. S. C. Ir. 1891, O. XIX. r. 4. But see Odgers on Pleading, p. 66.

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promise made out at the trial must be such a promise as was originally declared on. When the fresh promise, express or implied, is one between the same parties between whom the original liability was contracted, a count on the original cause of action will be in the proper form; for the only cause of action that can be taken out of the statute by acknowledgment or part payment is a debt or an *assumpsit* to pay an ascertained amount; and the reviving promise is simply a fresh undertaking of the same debt, or an *assumpsit* to satisfy the same sum, the consideration of the promise being the same as that which supported the old debt or *assumpsit*. An opinion has been expressed that, if the fresh promise was a conditional one, as, for instance, that the defendant would pay as soon as he could, such a promise ought to be declared on specially, and could not be used to support a count in the ordinary form for work done (1). But in such a case, when the condition is not in the nature of a new consideration, this view seems inconsistent with the judgment in *Tanner v. Smart* (2), and scarcely to be supported on principle. For if the original promise were a promise to pay for the work as soon as the defendant should have the money, the plaintiff might, on proof of ability, recover the debt under the ordinary count for work and labour. Moreover, the consideration for the fresh promise being executed and not executory will not as between the same parties support any other promise than that which the law would imply, namely—a promise to pay on request (3), so that a pleading laying a promise substantially different in point of law would be bad. And in an Irish case (4), where an attorney sued for work and labour done more than six years before action brought, and, the statute being

(1) *Haydon v. Williams*, 7 Bing. 163.

(2) 6 B. & C. 603.

(3) *Hopkins v. Logan*, 5 M. & W. 248.(4) *Hunter v. Hunter*, 3 Ir. R. C. L. 138.

pleaded, the plaintiff at the trial proved an agreement that he was to look for payment to a fund in Court first, and that the fund was not ascertained till within the six years, it was held by the Court of Queen's Bench (Whiteside, C.J, dissenting) that it was not necessary to declare specially on the agreement, but that the plaintiff might sue on the common count for work and labour, and give the agreement in evidence to take the case out of the statute.

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If the statute be pleaded to a statement of claim declaring on a bill of exchange, the plaintiff may join issue on the defence, and give in evidence an acknowledgment or part payment. This is no exception to the rule that the cause of action supported by such acknowledgment or part payment must be the same as that laid in the statement of claim; for, though an acknowledgment or part payment cannot be evidence of a fresh drawing or indorsement of the bill, it will be evidence of a renewal between the plaintiff and defendant of the debt resulting or *assumpsit* implied from the making or negotiating of the bill, and this debt or *assumpsit* is the cause of action in the case (1); and neither the Common Law Procedure Act, 1852, nor the Rules of the Supreme Court 1883, which give the present form of declaring on such an instrument, have altered the nature of the cause of action relied on (2).

In actions
on bills or
notes.

Where a part payment or payment of interest is relied on as saving a simple contract debt from the operation of the statute, there is no advantage in setting forth such payment in the statement of claim. If it appear by the statement of claim that interest has been paid within six years, a defence of the statute in the ordinary form is none the less a sufficient answer to the whole cause of action disclosed in the statement of claim (3).

Statement
of claim
alleging
part pay-
ment.

(1) See *Tanner v. Smart*, 6 B. & C. 603; Chitty on Bills, Part II. p. 279, *seq.* 3rd ed; 2 Chitty's Pleading, pp. 144, 338, 4th ed.

(2) R. S. C. 1883, App. C. s. 4; R. S. C. Ir. 1891, App. C. s. 4.

(3) *Hollis v. Palmer*, 2 Bingh. N. C. 713.

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Where, in an action on a simple contract, issue is joined on a defence of the statute, a promise made within six years cannot be relied on to defeat the plea of the statute, if the parties to the fresh promise are not identical with those between whom the original contract was made. Thus, if the original cause of action be a debt due from two persons jointly, and the promise relied on be a promise by one to pay his proportion, this must be declared on specially, and cannot be used in an action against both to defeat a defence of the statute pleaded by the one who made the new promise (1).

Acknowledgment
made to
executor.

In an action by an executor or administrator, if the statement of claim allege only promises made to the testator or intestate, and the statute be pleaded and issue joined on that plea, the plaintiff cannot support his case by proving an acknowledgment or part payment made to himself as the personal representative of the deceased; the promise evidenced by such an acknowledgment or payment is a promise not to the deceased, but to the executor or administrator, and is therefore out of the issue (2). In such a case a count should be inserted in the statement of claim, laying the promise as made to the plaintiff in his representative capacity. It appears to have been decided in one case (3) that an acknowledgment made to an executor was sufficient to support a declaration laying a promise to the testator, because the promise implied from the acknowledgment did not give any new cause of action,

(1) *Lechmere v. Fletcher*, 1 C. & M. 623, 626, n.

(2) *Hickman v. Walker*, Willes, 27; *Dean v. Crane*, 1 Salk. 28, 6 Mod. 309, 310, S. C. sub nom. *Green v. Crane*, 11 Mod. 37, 2 Ld. Raym. 1101; *Executors of Duke of Marlborough v. Widmore*, 2 Stra. 890; 2 Wms. Saund. 172; *Sarell v. Wine*, 3 East, 409; *Ward v. Hunter*, 6 Taunt. 210; *Short v. McCarthy*, 3 B. & Ald. 631; *Bodger v. Arch*, 10 Exch. 333; 24 L. J. Ex. 19; *Tanner v. Smart*, 6 B. & C. 603.

(3) *Williams v. Gun*, Fort. 177; see *Heylin v. Hastings*, Carth. 470.

but only prevented the bar of the statute. But this cannot now be considered law. If an executor brings an action on a bill of exchange or promissory note, which became payable more than six years before action and relies on a promise to pay made to himself since the testator's death, the statement of claim should aver the making of the bill or note and a promise to pay it made to the plaintiff as executor (1). The proper plea to such a count in order to put in issue the making of the promise is "the defendant did not promise as alleged" (2). This plea does not put in issue the original making of the bill or note, the action being not on the promise implied by law from the bill, but on the promise actually made to the plaintiff.

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It is said to have been held (3) that in an action *against* an executor, if the declaration merely allege a promise by the testator, and the statute be pleaded, the action may be supported by proof of a promise made by the executor himself, as such a promise is evidence of a liability of the testator in his lifetime, and the law will imply a promise to pay what he was liable to pay. But if such an opinion was ever expressed, it is clear that it cannot be supported, as it is inconsistent with the general principles which apply to acknowledgments and implied promises, and is clearly opposed to the weight of authority. And it may be considered settled that in actions against executors or administrators on simple contract debts, the same rules apply, if acknowledgments or part payments are relied on to save the bar of the statute, as have been laid down above with reference to actions in which the executor or administrator is plaintiff (4). If the plaintiff relies on a promise made by the

Acknowledgments in actions against personal representatives.

(1) *Bodger v. Arch*, 10 Exch. 333; 24 L. J. Exch. 19; Williams on Executors, 8th ed. p. 1890.

(2) R. S. C. 1883, App. D. s. 5; R. S. C. Ir. 1891, App. D. s. 5.

(3) Williams on Executors, *ubi supra*; *Timmis v. Platt*, 2 M. & W. 720; S. C. sub nom. *Gilbert v. Platt*, 5 Dowl. 748.

(4) *Browning v. Paris*, per Parke, B., 5 M. & W. 120.

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 — defendant in his representative capacity, he must insert a count in his statement of claim laying such a promise as the cause of action; and if the action be on a bill of exchange or promissory note, the statement of claim should be in the same form as that above suggested, namely, should state the making of the instrument, and then allege a promise to pay made by the defendant; the proper plea denying such a promise being "the defendant did not promise as alleged" (1).

Acknowledgment of wife's debt after marriage.

In an action before the Married Women's Property Act, 1882, against F. and N. and wife upon promises made by F. and the wife *dum sola*, issue was joined upon a plea of the statute, and the plaintiff proved an acknowledgment by F. after the marriage of N. and his wife, but it was held that this did not entitle the plaintiff to a verdict; for the issue was, whether there was any such promise within six years as the declaration stated, namely, a promise while the wife was sole, and a promise after the wife was married was not within that issue (2). Such a promise should be declared on specially, the original promise being laid as the consideration. The law in this respect would seem to be the same now since the Married Women's Property Act, 1882.

Pleading 3 & 4 Wm. IV. c. 42, s. 3.

In actions on specialties which are limited by 3 & 4 Wm. IV. c. 42, s. 3, an acknowledgment or part payment does not operate as evidence of a fresh promise constituting a new cause of action, but merely prevents the lapse of time barring the original right of action on the specialty. And, therefore, if the defendant plead that the cause of action did not accrue within twenty years, the plaintiff cannot, under a reply joining issue on such a plea, avail himself of an acknowledgment or part payment made within that time as taking the case out of

(1) *Rolleston v. Dixon*, 2 Dowl. & L. 892; and see Williams on Executors, 8th ed. 1891, 1957.

(2) *Pittam v. Foster*, 1 B. & C. 248; see now *Beck v. Pierce*, 23 Q. B. D. 316.

the statute, the only question raised by such an issue being, whether the cause of action accrued more than twenty years before (1). A reply that a specialty debt has been acknowledged within twenty years should state whether the acknowledgment relied on is by writing signed by the defendant, or writing signed by his agent, or by part payment (2). But an acknowledgment in writing, if relied on, need not be set out in the reply (3).

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It was decided in Ireland that a plea founded on the 40th section of 3 & 4 Wm. IV. c. 27, stating that the money sought to be recovered had become payable more than twenty years before, and that no acknowledgment had been given and no part payment made, was insufficient, as it was consistent with such a plea that within twenty years there had been some payment of interest (4). But when a motion was made for a writ of revivor on a judgment more than twenty years old, it was held by Wightman, J. (under 3 & 4 Wm. IV. c. 27, s. 40), that the affidavit in support of such motion must show that there had been an acknowledgment or payment within twenty years, as it was incumbent on the plaintiff to make out a *prima facie* case for the issuing of the writ (5).

Plea of sect.
40 of 3 &
4 Wm. IV
c. 27.

It has already been pointed out (6) that there were cases in which it was doubtful whether the revivor of a judgment conferred a new right from which time would begin to run afresh. But under the old practice, if a judgment of revivor was recovered in a *scire facias* by the executors of a judgment creditor, this judgment of revivor conferred a new right; and if a second *scire facias* was issued on the original judgment, when it was more than twenty years old, the judgment of revivor

- (1) *Kempe v. Gibbon*, 9 Q. B. 609.
- (2) *Forsyth v. Bristowe*, 8 Exch. 347; 22 L. J. Ex. 70.
- (3) *Kempe v. Gibbon*, 12 Q. B. 662.
- (4) *Molony v. O'Brien*, 5 Ir. L. R. 577.
- (5) *Loveless v. Richardson*, 2 Jur. N. S. 716.
- (6) Part III. Ch. II. p. 176.

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could not be made available to defeat a plea of the statute; a replication setting up that judgment was bad as a departure (1). In such a case the writ of *scire facias* should have recited the original judgment, and then have declared on the judgment of revivor obtained within twenty years (2). When the 40th section of 3 & 4 Wm. IV. c. 27 was pleaded to a *scire facias* upon a judgment, a replication stating that the judgment was entered upon a bond payable at the death of one J. W., which had occurred within twenty years, was on demurrer held a good answer to the plea (3). These questions of pleading are no longer of practical importance, as the procedure relating to the revivor of judgments is now governed by R. S. C. 1883, O. XLII. rr. 22 & 23 (4), and no pleadings are used.

Promises
not to
plead the
statute.

A promise not to plead the statute of James cannot be used to show a renewal of a debt, unless it be in writing and contain an acknowledgment of a subsisting liability (5). But whether in writing or not, if it be founded on good consideration which has been subsequently performed, it might, before the Judicature Acts, have been, it seems, enforced in equity (6); and it would now, it seems, be a good reply on equitable grounds to a plea of the statute.

Action
against
joint
debtors
where one
is dis-
charged.

It has already been pointed out that there are many cases in which several persons were originally liable to be jointly sued, but in which one or more of such persons can take advantage of some one of the Statutes of Limitations, while the others cannot. In such cases, should the action be brought against all the parties originally liable, or only against those who are not protected by statute? If the action is commenced against

(1) *Farran v. Beresford*, 10 Cl. & Fin. 319; 5 Ir. L. R. 487.

(2) *Conlan v. Bodkin*, 7 Ir. L. R. 467.

(3) *Kennedy v. Whaley*, 12 Ir. L. R. 54.

(4) R. S. C. Ir. 1891, O. XLII. rr. 24 & 25.

(5) See *ante*, Part I. Ch. IV. p. 94.

(6) *Trill v. Lade*, 6 Jur. 272.

all those originally liable, it might be defeated by a plea of the statute so far as concerns those who are entitled to raise such a defence, and in that case the plaintiff would have to discontinue his action as against them, and be liable to pay their costs. If the plaintiff sued only those who could not avail themselves of the statute, he might under the old practice have been met by a plea of abatement on the ground that he had not joined in the action all those who were jointly liable as defendants. As regards actions on a simple contract for which the time of limitation is provided by the Act 21 Jac. I. c. 16, the difficulty was obviated by the 2nd section of Lord Tenterden's Act (1), which enacted as follows:—

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“If any defendant or defendants in any action on any simple contract shall plead any matter in abatement to the effect, that any other person or persons ought to be jointly sued, and issue be joined on such a plea, and it shall appear at the trial that the action could not, by reason of the said recited Acts, or this Act, or of either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same.”

Lord Tenterden's
Act, s. 2.

This section is now repealed (2), and pleas in abatement in the High Court are abolished (3), and no action is liable to be defeated by reason of non-joinder of parties (4); and if a defendant is aggrieved by any such non-joinder, his proper remedy is to apply under R. S. C. 1883, O. xvi. r. 11 (5), for an order that the persons, who ought to have been joined as defendants, should be joined (6). It seems pretty clear that if co-

(1) 9 Geo. IV. c. 14.

(2) 53 & 54 Vict. c. 33. But see sect. 4.

(3) R. S. C. 1883, O. xxi. r. 20; R. S. C. Ir. 1891, O. xxi. r. 20.

(4) R. S. C. 1883, O. xvi. r. 11; R. S. C. Ir. 1891, O. xvi. r. 11.

(5) R. S. C. Ir. 1891, O. xvi. r. 11.

(6) *Pilley v. Robinson*, 20 Q. B. D. 155.

PART VIII. contractors who could plead the statute are not joined
CH. I. as defendants, and an application is made by the de-
 fendants to have such co-contractors joined, the order
 would not be made, as they are not persons who "ought
 to be joined," and their presence before the Court is not
 necessary "in order to enable the Court effectually and
 completely to adjudicate upon and settle all the ques-
 tions involved in the cause or matter" (1).

Pleading in equity. Before the Judicature Act, 1873, the rules and manner
 of pleading in courts of equity were widely different from
 the rules in courts of common law. Now, by the
 Judicature Act, 1873, s. 24, law and equity are to be
 administered concurrently in every civil cause or matter
 commenced in the High Court of Justice according to
 the rules set forth in that section. The rules of pleading
 which obtain both in the Queen's Bench Division and in
 the Chancery Division of the High Court of Justice are
 the same, and are to be found in R. S. C. 1883, O. XIX.—
 XXV. (2).

**Reply of
 concealed
 fraud to a
 plea of the
 statute.**

An important change relating to the Statutes of
 Limitation has been effected by the Judicature Act, 1873,
 in actions founded upon fraud. In such actions a reply
 to the plea of the statute that the fraud was actively and
 deliberately concealed by the defendant's act until within
 six years of the commencement of the action would now,
 it seems, since the Judicature Act, 1873, be a good reply
 in all actions which before the Judicature Act, 1873,
 could be brought either in a court of common law or in a
 court of equity, or in a court of equity alone (3). It
 would seem that a reply that the fraud was not discovered
 till within six years of the commencement of the action
 would not be a good reply except in actions which before
 the Judicature Act, 1873, could only have been brought
 in courts of equity. And in a pure common law action,

(1) R. S. C. 1883, O. XVI. r. 11; R. S. C. Ir. 1891, O. XVI. r. 11.

(2) See R. S. C. Ir. 1891, O. XIX.—XXV.

(3) *Gibbs v. Guild*, 8 Q. B. D. 296, 9 Q. B. D. 59.

e.g. an action for negligence which before the Judicature Act, 1873, could not have been brought in a court of equity at all, it has been doubted whether a reply of fraudulent concealment is not even now a bad reply (1). A reply of concealment in such an action is certainly bad, unless it allege that the concealment is the fraudulent act of the defendant (2).

If a plaintiff wish to rely on an allegation of concealed fraud in order to bring himself within sect. 26 of 3 & 4 Wm. IV. c. 27, he must in his statement of claim allege fully facts which reasonably lead to the inference that the fraud was the cause of his being deprived of the land which he claims (3).

The changes of law with reference to pleading introduced by the Judicature Acts and the Rules of the Supreme Court, 1883 (4), have made it unnecessary now to consider what rules governed the pleading of the statutes in equity before the Judicature Act, 1873. But it is worth noticing that one of the most important distinctions between the practice of courts of common law and that of courts of equity was that in law the statute had to be specially pleaded, while in equity, when it appeared on the face of a bill that the claim was barred by statute, the question of the statute might be raised and decided on a general demurrer for want of equity (5). And even in a case since the Judicature Act, 1873 (6), *Malins, V.-C.*, allowed a defendant to set up the statute

(1) *Armstrong v. Milburn*, 54 L. T. 247.

(2) *Armstrong v. Milburn*, 54 L. T. 247, 723; *Barber v. Houston*, 14 L. R. Ir. 273; 18 L. R. Ir. 475.

(3) *Lawrance v. Norreys*, 15 App. Cas. 210.

(4) O. XIX.-XXV: See R. S. C. Ir. 1891, O. XIX.-XXV.

(5) *Beckford v. Close*, cited 3 Br. Ch. C. 644; *Fyson v. Pole*, 3 Y. & C. 266; *Plunket v. Earl of Burlington*, *ib.* 275, n.; *Jenner v. Tracy*, 3 P. Wms. 287, n.; *Foster v. Hodgson*, 19 Ves. 180; *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 637; *Hoare v. Peck*, 6 Sim. 51; *Bampton v. Birchall*, 5 Beav. 67; *Smith v. Fox*, 6 Hare, 386; *Prance v. Sympton*, Kay, 678.

(6) *Noyes v. Crawley*, 10 Ch. D. 31.

PART VIII. on demurrer. But demurrers are now abolished (1); and it
CH. I. is clear that, except in actions for the recovery of land, the
 question of the statute cannot now be raised in the proceedings which have been substituted for demurrer (2), but that such a question must be raised by the pleading of the party who wishes to take advantage of it (3).

Defendant
 allowed to
 amend and
 plead the
 statute.

If a defendant, to whom the defence of the statute is open, omits through inadvertence to plead it, the Court, if of opinion that the plea of the statute is in the circumstances a meritorious one, will allow an amendment of the pleadings, so that the defendant may avail himself of the defence of the statute (4).

(1) R. S. C. 1883, O. xxv. r. 1; R. S. C. Ir. 1891, O. xxv. r. 1.

(2) R. S. C. 1883, O. xxv. rr. 2, 3, and 4; R. S. C. Ir. 1891, O. xxv. rr. 2, 3, and 4.

(3) See R. S. C. 1883, O. xix. r. 15; R. S. C. Ir. 1891, O. xix. r. 16.

(4) *Bone v. Smith*, 2 Ir. R. C. L. 244; *Archbold v. The Earl of Howth*, 15 Ir. C. L. R. 420.

CHAPTER II.

WHAT PROCESS WILL PREVENT THE BAR OF THE
STATUTE.

THE statutes above considered prohibit the bringing of an action more than a certain number of years after the right to bring the action accrued. The issuing of a writ (or now of an originating summons under R. S. C. 1883, O. LV. r. 20 (1)), is the commencement of the action for the purposes of all Statutes of Limitations. But if a writ be issued within the required time, and not properly continued, and a fresh writ be afterwards issued on which the plaintiff proceeds, the commencement of the action is the issuing of the last writ, and, if this be out of time, the plaintiff is barred (2).-

PART VIII.
CH. II.
—Commence-
ment of an
action.

By R. S. C. 1883, O. VIII. r. 1 (3), "No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the Court or a judge for leave to renew the writ; and the Court or judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent writ of summons be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed writ. . . . A writ of sum-

Renewal
of writs.

(1) See R. S. C. Ir. 1891, O. LV. r. 22.

(2) *Pratt v. Hawkins*, 15 M. & W. 399.

(3) R. S. C. Ir. 1891, O. VIII. r. 1.

PART VIII. mons so renewed shall remain in force and be available
CH. II. to prevent the operation of any statute whereby the time
 — for the commencement of the action may be limited, and for all other purposes from the date of the issuing of the original writ of summons." This rule applies to writs issued before, as well as to writs issued after, the Judicature Act, 1875 (1).

In Ireland almost exactly similar provisions are to be found in R. S. C. (Ir.) 1891, O. VIII. r. 1. Under the law as it formerly was in Ireland, no renewed writ was available to prevent the operation of any Statute of Limitations unless such renewal was had by leave of the Court or a judge on an affidavit to satisfy the said Court or judge that reasonable diligence was used to effect service (2). It was decided in Ireland under the old law, that when there were several defendants to an action, some of whom might have been served, though others could not, the renewal of the writ would prevent the statute operating in favour of any of the defendants (3).

The six months during which a renewed writ of summons continues in force are reckoned, it will be noticed, inclusive of the day of renewal. This is now provided for by the express terms of the rule; but under the 11th section of the Common Law Procedure Act, 1852, which contained no such express provision, where a writ had been renewed on the 19th July, 1862, and an application for another renewal was made on the 19th January, 1863, the 18th being a Sunday, it was held that the application was too late (4).

If by any mistake of the plaintiff, or his attorney, a writ has not been renewed within the proper time, the Court will not allow the writ to be afterwards renewed in order to save the case from the bar of the Statute of

(1) *Hume v. Somerton*, 25 Q. B. D. 239.

(2) See 16 & 17 Vict. c. 113, s. 28.

(3) *Dickson v. Capes*, 11 Ir. C. L. R. 334.

(4) *Anon.* 1 H. & C. 664; 32 L. J. Exch. 88.

Limitations (1); and this was held even where an attempt had been made to get the writ renewed before the six months had elapsed, and failed only because the office was closed for the vacation; the ground of this decision was that there was no default on the part of any public officer (2). Nor will the Court, where the original writ has been lost, order its officer to seal a verified copy of the writ as if it were the original (3). But when a writ of summons for service within the jurisdiction had been issued, but not served, and had been renewed from time to time and was still in force, the Court enlarged the time for applying for a concurrent writ of summons under R. S. C. 1883, O. VI. (4) for service out of the jurisdiction (5).

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A writ will not be amended by dating it before the day on which it actually issued, though it was by mistake that the writ was not issued before; when a judge had so amended a writ, the order to amend was rescinded, though the defendant had appeared (6). And a plaintiff will not be allowed to amend his pleadings so as to introduce a cause of action which is barred by the statute at the time of the attempted amendment (7). Nor will the assignee of a chose in action who has not given to the debtor notice of the assignment, as required by sect. 25, sub-sect. 6, of the Judicature Act, 1873, and who has brought an action against the debtor in his own name, be allowed to amend his writ by adding the assignor as a plaintiff, when the statutory period has expired between the issue of the writ and the time of the

Amend-
ment of
writ.

(1) *Nazer v. Wade*, 1 B. & S. 728; 31 L. J. Q. B. 5; *Bailey v. Owen*, 9 W. R. 128; *Doyle v. Kaufman*, 3 Q. B. D. 7, 340; *Hewett v. Barr* (1891), 1 Q. B. 98; *Mages v. Hastings*, 28 L. R. Ir. 288.

(2) *Evans v. Jones*, 2 B. & S. 45; *Anon.* 31 L. J. Q. B. 61; see *Anon.* 24 L. J. Q. B. 23.

(3) *Davies v. Garland*, 1 Q. B. D. 250.

(4) R. S. C. Ir. 1891, O. VI.

(5) *Smallpage v. Tonge*, 17 Q. B. D. 644.

(6) *Clarke v. Smith*, 2 H. & N. 753; 27 L. J. Exch. 155.

(7) *Weldon v. Neal*, 19 Q. B. D. 394.

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attempted amendment (1). In a case before the Common Law Procedure Act, 1852, the Court amended after trial by striking out some of the defendants improperly joined, setting aside a non-suit owing to such mis-joinder, and allowed a new trial, the defendants having leave to plead *de novo* (2); this was done to save the operation of the statute, but in that case it was admitted that some of the defendants were liable, and the only question was which. In a case since the Judicature Acts (3), an application was made for amendment of a writ by inserting the name of one of three co-executors in substitution for a name which had been inserted by mistake. Since the writ was issued, the six years had expired. The judge in chambers allowed the amendment. The Divisional Court differed in opinion, Denman, J., being in favour of the amendment, Grove, J., against it. If a writ has been amended by correcting the name of a defendant, the original writ, not the amendment, is the commencement of the action (4). Under the Common Law Procedure Act, 1852, it was held that a plaintiff might before service of a writ correct a mistake in the name of the defendant or the number of the defendants against whom he had sued it out without an order of the Court, the writ being resealed, but the original date remaining unaltered (5). And it would seem that the plaintiff can now before service make any alteration in the writ without an order (6), but the day of issue of the writ cannot be altered (7).

Fresh
action.

In the case of *Manby v. Manby* (8), a creditor issued a writ in the Common Pleas against the personal representative of a deceased debtor on the 7th January, 1875,

(1) *Hudson v. Fernyhough*, 61 L. T. 722; on appeal, 34 Sol. Jo. 228.

(2) *Crawford v. Cocks*, 20 L. J. Exch. 169.

(3) *Challinor v. Roder*, 1 Times L. R. 527.

(4) *Coombs v. Bristol and Exeter Ry. Co.*, 1 F. & F. 206; *Ryan v. Sheehy*, 12 Ir. L. R. 44.

(5) *Gibson v. Varley*, 26 L. J. Q. B. 79.

(6) See Practice Master's Rules (13), Annual Practice 1893, p. 1118.

(7) *Clarke v. Smith*, 2 H. & N. 753; 27 L. J. Exch. 155.

(8) 3 Ch. D. 101.

within six years from the death of the debtor; the writ was never served, but on the 6th July, 1875, the creditor took out an administration summons in the Chancery Division; on the 6th July, 1875, the debt was barred, unless it was kept alive by the issuing of the writ in the Common Pleas; it was contended that the taking out of the summons was a sufficient continuance of the writ under the 11th section of the Common Law Procedure Act, 1852 (1); but Malins, V.-C., held that it was not, and that the issuing of the writ in the Common Pleas only kept the debt alive for the purposes of the action in that Court and not for all purposes.

By the 4th section of 21 Jac. I. c. 16, if judgment is given for the plaintiff, and afterwards reversed by a writ of error, or arrested after verdict, or if the defendant is outlawed, and the outlawry reversed, a new action may be commenced within a year afterwards. And a similar provision is made in the 6th section of 3 & 4 Wm. IV. c. 42, and the 21st section of the Irish Common Law Procedure Act, 1853 (2). But the provision as to outlawry in the 6th section of 3 & 4 Wm. IV. c. 42 has been repealed (3), and proceedings in outlawry in civil proceedings are abolished (4). Proceedings in error in civil proceedings are no longer in use (5).

Where a *scire facias* was issued in time to save the bar of 3 & 4 Wm. IV. c. 27, s. 40, and came to the knowledge of the defendant, though the sheriff did not properly serve him with the writ, and the sheriff nevertheless returned *scire feci*, the Court of Common Pleas in Ireland refused to set aside the return, as in the circumstances of the case, if a new writ had been required, the statute would have been a bar, and the only default had been on

(1) 15 & 16 Vict. c. 76.

(2) 16 & 17 Vict. c. 113.

(3) 51 & 52 Vict. c. 57.

(4) 42 & 43 Vict. c. 59.

(5) R. S. C. 1833, O. LVIII. r. 1; R. S. C. Ir. 1891, O. LVIII. r. 1.
And see 39 & 40 Vict. c. 59, s. 11.

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the part of a public officer, and not on the part of the plaintiff (1). If the writ had not come to the knowledge of the defendant, it may be that the only remedy of the plaintiff would have been an action against the sheriff for negligence.

Claims
brought in
under
adminis-
tration
decree.

When claims are brought in under a judgment in an administration action, a question of importance arises whether the bringing in of the claim is to be considered as the commencement of the suit or whether the issuing of the writ (formerly the filing of the bill) stops the operation of the statute for the benefit of all creditors coming in under the judgment. The question arose under the old practice before 3 & 4 Wm. IV. c. 27, in *Sterndale v. Hankinson* (2), with reference to a simple contract debt; a claim in the usual course had been brought in under a decree in an administration suit which was instituted by a creditor on behalf of himself and all other creditors; it was held that the bill was the bill of the claimant to such an extent as to make it his suit for the purpose of stopping the statute from running. As the debt in this case was a simple contract debt, the Court was not at the time of the decision actually bound by any statute.

Berrington v. Evans (3) was the case of a judgment debt; the bill was filed after 3 & 4 Wm. IV. c. 27, and the claim was made by petition after decree on further directions and when part of the funds had been distributed amongst the creditors; the petitioner, by way of excuse for not coming in under the decree in proper time, alleged that he had not seen the advertisements published by the Master and that he knew nothing of the proceedings and was ignorant of his rights under them; it was held by Lord Abinger, C.B., that the bill could not be considered the bill of the claimant, and that for

(1) *Markey v. Dowdell*, 2 Ir. C. L. R. 117.

(2) 1 Sim. 393.

(3) 1 Y. & C. Exch. 434.

the purposes of the statute the petition was the commencement of the suit. Lord Abinger in his judgment used expressions which seem to show that the principle of *Sterndale v. Hankinson* could not be applied to any case within 3 & 4 Wm. IV. c. 27, since the passing of that Act. And Shadwell, V.-C., seems to have taken the same view (1). In Ireland *Berrington v. Evans* was followed as deciding that where the claimant came in, not in the ordinary course, but in circumstances which show that he had not adopted the suit as his own, then the bringing in of the claim must be considered as the commencement of the suit and the filing of the bill would in no way benefit the claimant (2). But, so far as the expressions used in Lord Abinger's judgment are inconsistent with the decision in *Sterndale v. Hankinson*, they have not been considered law in Ireland, and the latter case has, notwithstanding the expressions of Lord Abinger, been applied to judgment debts where the claimant has come in under the decree in the ordinary course (3). Lord St. Leonards, when L.C. of Ireland, was of opinion (4) that *Berrington v. Evans* was properly decided, but that it did not impeach the previous decision in *Sterndale v. Hankinson*, and did not prevent a creditor from coming in under another creditor's bill filed for the general benefit of creditors, when his demand would not have been barred, had he himself filed the bill and where he came in according to the decree and course of the Court.

In England, under the present practice in administration actions, the decision in *Sterndale v. Hankinson* has become quite inapplicable. When any proceeding is now taken in the Chancery Division of the High Court

(1) *Lord St. John v. Boughton*, 9 Sim. 219 at p. 225; see also *Watson v. Birch*, 15 Sim. 523.

(2) *O'Kelly v. Bodkin*, 3 Ir. Eq. R. 390; *Hutchins v. O'Sullivan*, 11 Ir. Eq. R. 443.

(3) *O'Kelly v. Bodkin*, 2 Ir. Eq. R. 361; *Carroll v. Darcy*, 10 Ir. Eq. R. 321; and see *Birmingham v. Burke*, 2 J. & Lat. 699, 714; and *Bennett v. Bernard*, 12 Ir. Eq. R. 229, 234.

(4) 2 J. & Lat. 714; 9 Ir. Eq. R. 93.

PART VIII. to recover a simple contract debt, the Chancery Division
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 — is as much bound by the statute of James as the Queen's Bench Division (1). Moreover, it is no longer the practice, as far as the personal estate is concerned, for one creditor to bring an administration action on behalf of himself and others. Thus, in the case of *In re Greaves, Bray v. Tofield* (2), where an administration action was commenced by one of the executors, who was also a creditor of the testator, and a claim was brought in by a creditor for a simple contract debt, which was more than six years old at the time of the decree, but not at the time of the commencement of the action, it was held by Jessel, M.R., that the claim was barred by statute.

The action by whomsoever commenced must, to come within the reasoning of the cases, be in its nature one for the recovery of the demand sought to be saved from the bar of the statute, and, therefore, if in a foreclosure action an inquiry is directed as to incumbrances, no incumbrancer coming in under the decree can get any benefit from the commencement of the action, so far as the Statute of Limitations is concerned (3).

Watson v. Birch.

It was held in Ireland (4) that, if a bill by a creditor is substantially a bill on behalf of himself and all others, it is immaterial whether it is so expressed or not; but Shadwell, V.-C., in *Watson v. Birch* (5), appears to have been of a different opinion. The last-mentioned case, however, was rather a peculiar one. The bill praying the usual administration decree was filed by an annuitant on behalf of himself alone; R., a judgment creditor of the testator, who claimed a lien on certain documents in his possession, was made a defendant; the bill prayed production of the documents and that the lien, if any, might be ascertained, and paid according to its priority.

(1) *In re Greaves. Bray v. Tofield*, 18 Ch. D. at p. 554.

(2) 18 Ch. D. 551.

(3) *Bennett v. Bernard*, 12 Ir. Eq. R. 229.

(4) *O'Kelly v. Bodkin*, 2 Ir. Eq. R. 361.

(5) 15 Sim. 523.

The decree directed payment of the annuity out of a fund in Court, and, without directing an account of what was due to other incumbrancers, ordered that the amount found due should be paid. R.'s personal representative afterwards presented a petition praying that it might be referred back to the Master to ascertain what was due on the judgment and praying for payment; on that petition an order was made directing the Master to inquire as to incumbrancers generally; and on the Master's finding that R.'s personal representative was the only incumbrancer and certifying what was due to her, she presented a petition for payment; but it was held that there was no commencement of proceedings on behalf of R. until the presentation of his first petition, which was out of time, and therefore that the debt was barred. It is submitted that in the circumstances it was properly held that the suit was not the suit of R.; but the case is disapproved of by Lord St. Leonards (1).

However, in *Humble v. Humble* (2), it seems to have been the opinion of Romilly, M.R., that if an incumbrancer be made a defendant to a suit in which he might obtain payment of his charge, he will be exonerated from the necessity of taking further proceedings to prevent time running against him, and that time will cease to run from the moment of his being so made a defendant. In that case the bill was filed by legatees for the administration of the real and personal estate of a testator who had charged his legacies on his real estate, and one of the residuary devisees had mortgaged his share. At the time of the filing of the bill the legatee did not know of the mortgage, and it was not till many years afterwards that the mortgagees were made defendants by a supplemental bill. The mortgagees had not taken any steps whatever during the whole period to realise the security or enforce their claims, and after the estates had

Effect of
making an
incum-
brancer a
defendant.

(1) Property Statutes, 124.

(2) 24 Beav. 535.

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been sold in the suit, upon a petition by the assignees of the residuary devisee for payment to them of a share of the money in Court, it was decided that they were entitled to it as against the mortgagees whose claim was held barred. The Master of the Rolls in the circumstances held that the mortgagees' claim was barred long before they were made defendants, but he intimated an opinion that, if it had not been then barred, time would have stopped running at that moment. If Romilly, M.R., was right in this opinion, then it would seem that Shadwell, V.-C., in *Watson v. Birch* (1), ought to have been decided differently, on the ground that the incumbrancer had been made a defendant before the lien was barred. Considering the question on principle, it would seem that when a plaintiff makes an incumbrancer a defendant, on the ground that the latter claims a charge, then, if this charge is established in any way in the suit, either by the decree itself or by a chief clerk's certificate, made in pursuance of inquiries and duly confirmed, the defendant is entitled to obtain the benefit of the decree or order establishing his charge in any way and at any time at which, according to the rules of the Court, he could obtain such benefit, quite irrespective of any question arising on the statute; and that, if to obtain actual payment it be necessary for any reason to present a petition, such petition ought to be considered as a means of obtaining the benefit of the order or decree, and not a proceeding to recover money. If the question of the validity of the incumbrance is determined under an inquiry, then, as the incumbrancer is a defendant, the suit cannot be his, and it would seem that his claim under the inquiry ought to be considered the commencement of proceedings, and that the plaintiff could set up the defence of the statute, treating it as running until the claim under the inquiry was made. If this view is right, the case of *Watson v. Birch* was rightly decided; for in

(1) 15 Sim. 523.

that case the incumbrancer did not get the benefit of the decree or the inquiry, and his petition praying that the Master should ascertain what was due was rightly taken as the commencement of proceedings, just as if the incumbrancer had gone in under inquiries made in pursuance of the decree. If, however, the question of the existence of the charge is decided upon the hearing, it seems on the words of the statutes difficult to see how the plaintiff can set up the defence at all; for, as the debt is not extinguished and the defendant has not instituted any proceedings which can be barred, the statutes would seem not to have any application, whether the statutory period has run before or after the incumbrancer was made defendant; and except that on the ground that when an incumbrancer has been made defendant to a suit in which he may reasonably expect his claim to be adjudicated on, he cannot be considered guilty of laches in not filing a bill of his own, there seems no reason why the plaintiffs should be able to take advantage of the statute in one case more than the other. If this view is right, the question whether time stops running when the party is made a defendant can never arise; but, as it seems doubtful how the Court will deal with such cases, it would be always prudent for a defendant in such a position to counterclaim, if there is any chance of the statutory period running out between the time of his being made a defendant and an order in the suit establishing his charge.

An ordinary administration decree made in a legatee's suit operates as a judgment in favour of creditors and prevents time running against them (1). An administration order operates as from its date, not merely in favour of a creditor, but in favour also of the right of set-off against a creditor's demand (2).

It has already been pointed out that the appointment

Pending
litigation.

(1) *Finch v. Finch*, 45 L. J. Ch. 816.

(2) *In re Ballard*. *Lovell v. Forester*, 1890, W. N. 64.

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of a receiver does not operate to save the rights of any persons but the parties to the suit in which the receiver is appointed (1). It has also been pointed out that a report by the Master establishing a debt in one suit is not an acknowledgment which will take the case out of the statute, if it be set up as a defence to any independent suit by the creditor (2); and, although O'Loughlen, M.R., seems to have expressed a somewhat different opinion (3), it may be considered clear on principle that neither the pendency of any suit in which the claim of any person, whether a party or not, might be or has been decided, nor any order or proceeding in such suit can in any circumstances affect the operation of the statute on the claim of such person in an independent suit instituted by him to enforce his claims (4). It may or may not be that he can get the benefit of some order in the first suit by a proceeding in the same suit, but such order is of no avail in an independent suit (5). There is one case (6) apparently at variance with this view. There the Master found in one suit that an incumbrance existed; the incumbrancer was not a party to the first suit, but he afterwards filed an independent bill to enforce the incumbrance; it was held that he was entitled to arrears of interest calculated from the time when his claim in the first suit was brought before the Master, and not merely from the time when the second suit was commenced; in this case the petition on which the point was decided was presented in both suits; and the variance is more apparent than real (6).

In *Archdall v. Anderson* (7), an action had been brought by a mortgagee to raise the amount due on an equitable mortgage, and lands had been sold under a judgment in

(1) See *ante*, Part V. Ch. XVIII. p. 425.

(2) See *ante*, Part III. Ch. V. p. 223.

(3) See *Barrett v. Birmingham*, 4 Ir. Eq. R. 537, 548.

(4) See *Manby v. Manby*, 3 Ch. D. 101.

(5) *Toft v. Stephenson*, 7 Hare, 1, and *Alsop v. Bell*, 24 Beav. 451.

(6) *Greenway v. Bloomfield*, 9 Hare, 201.

(7) 25 L. R. Ir. 433.

that action and had realised more than sufficient to pay the plaintiff's demand; an order was made directing inquiries as to other incumbrances on the lands sold and their priorities; claims were thereupon made by legatees, and it was held that they were entitled to interest for six years before the commencement of the action on the ground that the action enured for the benefit of all incumbrancers coming in and obtaining payment under the proceedings.

It has been decided in Ireland that a petition for sale by an incumbrancer in the Incumbered Estates Court is a suit for the benefit of all persons interested in the proceeds of sale, that such persons are exonerated from taking proceedings which might otherwise be necessary, and that for the purpose of all questions of the statute the incumbrancers will, in the distribution of the purchase money, be treated as they stood at the date of the petition (1). If, however, an incumbrancer has taken proceedings to enforce his charge before the petition for sale, and the proceedings are interrupted by the petition, he will, on the distribution of the money, be entitled to all he could have recovered in those proceedings as if they had never been so interrupted (2). Where a petition in the Landed Estates Court has been dismissed, the statute must be taken to have been running all the time as if the petition had not been filed (3). Where an incumbrancer who has proved his claim in an administration action in which he was a defendant presents a petition for sale in the Landed Estates Court in pursuance of the judgment in the administration action, the statute does not run against him after the commencement of the administration action (4). The owner of a tithe rent-

Petition
for sale in
Incum-
bered
Estates
Court.

(1) *In re Colclough*, 8 Ir. Ch. R. 330; *In re Nixon's Estate*, 9 Ir. R. Eq. 7; *In re Wade's Estate*, 13 L. R. Ir. 515; *In re Stinson's Estate*, 29 L. R. Ir. 490; *In re Ebbs' Estate*, 31 L. R. Ir. 95.

(2) *In re Lawder*, 6 Ir. Ch. R. 587.

(3) *Irish Land Commission v. Davies*, 27 L. R. Ir. 334.

(4) *In re Ebbs' Estate*, 31 L. R. Ir. 95.

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charge is not a person interested in the proceeds of the sale within the principle of the decision in *In re Colclough* (1), because of the special provisions of sect. 62 of the Landed Estates Court Act (2); and neither an absolute order for sale nor the appointment of a receiver in the matter of a petition in the Court of the Land Judges prevents the statute from running as against the owner of tithe rent-charge issuing out of the land ordered to be sold, or over which a receiver has been appointed (3).

An order for sale obtained by an owner and petitioner in the Landed Estates Court is not an action for the recovery of land so as to prevent the running of the statute in favour of the person in possession (4). But the filing in the Landed Estates Court by an incumbrancer of a petition for sale is a proceeding to recover money charged on land within the 8th section of the Real Property Limitation Act, 1874 (5), and prevents the statute from running against the petitioner until the petition has been dismissed (6).

When money is paid into Court by a receiver appointed in a suit, the money, until it is appropriated to some particular demand, is held *in usum jus habentium*, and the statute does not run against the right of a person entitled from the time of the payment in (7).

Proceed-
ings in
bank-
ruptcy and
winding-
up.

Proceedings in bankruptcy or for the winding up of a company are for the benefit of all creditors and prevent the statute from running (8). The statute does not run in the case of a bankruptcy after the date of the receiving

(1) 8 Ir. Ch. R. 330; see *ante*, p. 571.

(2) 21 & 22 Vict. c. 72.

(3) *In re Wade's Estate*, 13 L. R. Ir. 515.

(4) *In re Taaffe's Estate*, 1 L. R. Ir. 387.

(5) 37 & 38 Vict. c. 57.

(6) *In re Stinson's Estate*, 29 L. R. Ir. 490.

(7) *Howlin v. Sheppard*, 6 Ir. R. Eq. 38; see *In re Nugent's Trusts*, 19 L. R. Ir. 140.

(8) Buckley on the Companies Acts, 6th ed., pp. 271, 370.

order (1), and in the case of the winding up of a company under sect. 98 of the Companies Act, 1862, after the date of the winding-up order (2). The decision to the contrary effect in *Ex parte Forest* (3) is not now an authority. Debts barred by the statute at the date of the receiving or winding-up order cannot be proved in the bankruptcy or winding-up (4). Debts existing at the date of the winding-up order and not then barred are proveable, although no claim in respect of them be made until after the expiration of the time when but for the winding-up order the debts would have been barred. Bankruptcy renders a debt, when proved, a solemn continual legal demand, against which time will not run (5). Proceedings in bankruptcy and in winding-up can of course have no effect as regards debts due to the bankrupt or company. A motion in the bankruptcy or in the winding-up proceedings for the payment of a debt due to the bankrupt or company is a process analogous to an action, and, if made after the lapse of the statutory period, is barred just like an action (6).

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Before the Judicature Act, 1873, the right to file a bill of revivor or supplement after a decree was not barred by any statute or any rule of the Court, but depended entirely upon the discretion of the Court according to the circumstances of the case (7), with this exception,

Bills of revivor and supplement.

(1) *Ex parte Ross. In re Coles*, 2 G. & J. 46, 330; Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 37, sub-s. 3; Williams' Bankruptcy Practice, 5th ed. p. 111.

(2) *Joint Stock Discount Co.'s Claim*, L. R. 7 Ch. 646; *In re Gloucester, &c., Ry. Co.*, 2 Giff. 47; 29 L. J. Ch. 383; *Wryghte's Case*, 5 De G. & Sm. 244; *In re Warwick and Worcester Ry. Co.*, 27 L. J. Ch. 735; and see *Ex parte Higgins*, 2 Jur. N. S. 178; Lindley on Companies, 5th ed. p. 723.

(3) 2 Giff. 42.

(4) Lindley on Companies, 5th ed. p. 723; see *ante*, p. 19.

(5) *Ex parte Healey*, 1 Deac. & Chitt. 361, at p. 369.

(6) *In re Mansell. Ex parte Norton*, 66 L. T. 245.

(7) Mitford's Pl., 272; *Hollingshead's Case*, 1 P. Wms. 742; *Hercy v. Dinwoody*, 4 Br. C. C. 257; *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 632-639; *Earl of Egremont v. Hamilton*, 1 Ball & Beatty, 531; *Higgins v. Shaw*, 2 D. & War. 356; *Alsop v. Bell*, 24 Beav. 451; *Patch v. Holland*, 29 L. T. N. S. 419.

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that if the decree was not a decree to account, but a final decree for the payment of a sum of money, it was in the nature of a judgment at law, and a bill of revivor or supplement to get the benefit of such a decree was therefore limited by the 40th section of 3 & 4 Wm. IV. c. 27 (1); nor was any statute a bar to the right of a party to prosecute a decree, but, if a party committed gross laches in doing so, the Court would direct him to prosecute it with effect within a short period, and in default dispose of the matter summarily under the 37th section of 15 & 16 Vict. c. 80 (now repealed : see 38 & 39 Vict. c. 66).

The procedure as to reviving a suit has been altogether changed since the Judicature Act, 1873, and is now governed by R. S. C. 1883, O. xvii. r. 1 (2), which provides that a cause or matter shall not become abated by reason of the marriage, death or bankruptcy of any of the parties, if the cause of action survive or continue, and shall not become defective by the assignment, creation, or devolution of any estate or title *pendente lite*, and, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict, or finding of the issues of fact, and the judgment, but judgment may in such cases be entered, notwithstanding the death; rules 2–10 of the same order (3) provide for the carrying on of an action by or against the proper persons.

These rules have not interfered with the equitable construction of sect. 4 of the statute of James (4), or of sect. 6 of 3 & 4 Wm. IV. c. 42 (5), but have only supplied an additional remedy. Thus, where a plaintiff issued a writ within the six years, but the defendant died before

(1) *Dunne v. Doyle*, 10 Ir. Ch. R. 502; and see *Ongé v. Truelock*, 2 Molloy, 38.

(2) See R. S. C. Ir. 1891, O. xvii. r. 1.

(3) R. S. C. Ir. 1891, O. xvii. rr. 2–11.

(4) See *ante*, p. 52.

(5) See *ante*, p. 148.

the writ was served, but while the writ was still a valid writ, and the plaintiff commenced a fresh action against the executors of the defendant within a year of the proof of the will, but more than six years after the accrual of the cause of action, it was held that the fresh action was rightly brought, and that the plaintiff was not obliged to resort to the steps made possible by O. xvii. (1).

It seems that the granting of an order for the substitution of parties under R. S. C. 1883, O. xvii. r. 4 (2) is within the discretion of the Court. In *Arnison v. Smith* (3), where some of the plaintiffs had died before trial and the proceedings had gone on and judgment been given, the Court of Appeal refused to make an order after final judgment allowing the executors of the deceased plaintiffs to carry on the action, but both Cotton and Lindley L.JJ., seem to have thought that in such a case, if there were any fear of the statute being set up in a fresh action, the Court would make the order. It seems that such an application should be made within a reasonable time, and in the case of the death of a party intestate the fact that there was no personal representative appointed for a considerable time would not prejudice such an application (4). In the absence of special circumstances an order of revivor after judgment under O. xvii. r. 4, for the purpose of enabling parties to appeal, will not be made after the expiration of the time limited for appealing (5). The fact of there being no personal representative in existence would perhaps be a special circumstance in such a case (6). An order under O. xvii. r. 4 will not be made for the purpose of reviving the remedy on a judgment which has been

(1) *Swindell v. Bulkeley*, 18 Q. B. D. 250.

(2) R. S. C. Ir. 1891, O. xvii. r. 4.

(3) 40 Ch. D. 567.

(4) See *Perry v. Jenkins*, 1 Myl. & Cr. 118; and see *ante*, Part II. Ch. II. p. 148.

(5) *Curtis v. Sheffield*, 21 Ch. D. 1; *Fussell v. Dowding*, 27 Ch. D. 237.

(6) See *Perry v. Jenkins*, 1 Myl. & Cr. 118.

PART VIII. barred by sect. 8 of 37 & 38 Vict. c. 57 (1). Where the
 CH. II. Court holds money that has been paid in to the credit
 of a suit, lapse of time, however long, is no ground for
 refusing an order for revivor. Thus recently Chitty, J.,
 granted an order of revivor after the lapse of 150 years,
 the applicant seeking the order in order to get at funds
 which were in Court, but the order was limited to that
 extent (2).

Bills of
 review.

Bills of review, it seems, were, before the Judicature
 Act, 1873, absolutely barred in twenty years from the
 date of the decree. This rule was adopted by analogy
 to the limitation of twenty years prescribed for writs of
 error by 10 & 11 Wm. III. c. 14 (3). It would appear
 that even since the Judicature Acts, the Chancery
 Division of the High Court can grant leave to bring an
 action in the nature of a bill of review (4), but leave
 would probably be refused, if application were made more
 than twelve years from the date of the judgment; such
 an application would probably now be held to be governed
 by sect. 8 of 37 & 38 Vict. c. 57.

(1) *Jay v. Johnstone* (1893), 1 Q. B. 25, 189; *Evans v. O'Donnell*,
 18 L. R. Ir. 170.

(2) *Micklethwaite v. Vavasour*, 9 Times L. R. 376; 37 Sol. Jo. 386.

(3) *Smith v. Clay*, 3 Br. C. C. 639, note.

(4) *Falcke v. The Scottish Imperial Insurance Co.*, 57 L. T. 39; 35
 W. R. 794. But see *In re St. Nazaire Co.*, 12 Ch. D. 88.

PART IX.

CHAPTER I.

MISCELLANEOUS LIMITATIONS UNDER VARIOUS ACTS.

IN conclusion it may be well to mention certain special provisions which do not come within the scope of any of the former chapters.

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CH. I.

Local and personal Acts frequently contain special provisions limiting the right of action against persons having powers under such Acts for anything done under the provisions of the Acts, and there are many public Acts that contain similar provisions. It is of course out of the question to enumerate the local and personal Acts that contain such provisions. As to the public Acts, without attempting to enumerate them all, the following are given as instances of such provisions.

By 35 Geo. III. c. 125, it is provided that, when an heir apparent to the throne has a separate establishment, any person having or claiming any debt or demand against him must deliver the particulars of it to the proper officer within ten days after the expiration of the quarter in which the debt or demand was incurred, or that in default every such debt or demand shall be barred both at law and in equity, and every security given in consideration thereof shall be void (1), and that, when such particulars have been properly delivered, the creditor may sue and prosecute in the manner therein

Claims
against
heir appa-
rent to
throne.

(1) Sect. 7.

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—

provided for such debt or demand within three calendar months after delivery of such particulars, but not afterwards (1).

Turnpike
Act.

By the General Turnpike Act (2), any action or suit against any person for anything done in pursuance of or under the authority of the Act must be commenced or prosecuted within three months of the fact committed, and not afterwards.

Highway
Act.

By the Highway Act, 1835 (3), no action or suit can be commenced against any person for anything done in pursuance of or under the authority of the Act after three calendar months next after the fact committed for which such action or suit shall be so brought. In the case of *Taylor v. Meltham Local Board* (4), it was held by Grove and Denman, JJ., that in the case of a local board who had been constituted surveyors of highways by sect. 117 of the Public Health Act, 1848 (5), the period of limitation was six months under sect. 139 of the Public Health Act, 1848, and not three months under the Highway Act, 1835. This case was distinguished by Cave, J., in *Burton v. Mayor and Corporation of Salford* (6); in that case the mayor and corporation of Salford had been constituted surveyors of highways by a local Act passed in 1862, which provided that they should have all such powers and be subject to all such liabilities as any surveyors of highways were invested with and subject to by virtue of the law for the time being in force; at the time of the passing of the local Act the only limitation in force which was applicable to surveyors of highways was that provided by sect. 109 of the Highway Act, 1835, viz. three months, unless the case fell within the provisions of 5 & 6 Vict. c. 97, s. 5, which fixes the period of limitation

(1) Sect. 9.

(2) 3 Geo. IV. c. 126, s. 147.

(3) 5 & 6 Wm. IV. c. 50, s. 109.

(4) 47 L. J. C. L. 12.

(5) 11 & 12 Vict. c. 63.

(6) 11 Q. B. D. 286.

at two years for anything done under local and personal Acts (1). After the passing of the local Act in question the Public Health Act, 1875 (2), was passed, sect. 144 of which enacts that corporations should within their district execute the office of and be subject to all the powers, authorities, and liabilities of surveyors of highways under the law for the time being in force; by sect. 264 the period of limitations governing actions for things done under the provisions of the Act is six months; sect. 340 enacts that, where within the district of a local authority any local Act is in force providing for purposes the same as or similar to the purposes of the Public Health Act, 1875, proceedings might be instituted at the discretion of the authority or person instituting the same under the local Act or the Public Health Act, 1875, or both; by sect. 341 all powers given by the Public Health Act, 1875, are to be deemed to be in addition to and not in derogation of any other powers conferred by Act of Parliament, and such other powers may be executed in the same manner as if the Public Health Act, 1875, had not been passed. Cave, J., held that 5 & 6 Vict. c. 97, s. 5 did not apply, and that the corporation, in acting as surveyors of highways, were acting under the Highway Act, 1835, and that sect. 341 of the Public Health Act, 1875, enabled them to act under the Highway Act, 1835, instead of under the Public Health Act, 1875, and that, in the absence of proof that they were acting under the later Act, the period of limitation was three months under the Highway Act, 1835, and not six months under the Public Health Act, 1875.

In *Kay v. Atherton Local Board* (3), an action was brought against an urban sanitary authority to recover damages for injuries caused by the defendants, who, while repaving a road, left a heap of stones insufficiently

(1) See *post*, p. 588.
 (2) 38 & 39 Vict. c. 55.
 (3) 42 J. P. 792.

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lighted; Kelly, C.B. and Cleasby, B., held that, although the defendants were constituted surveyors of highways by the Public Health Act, 1875, yet, as they derived their powers as surveyors from the Public Health Act, they were acting under the Public Health Act, 1875, and that the period of limitation was six months and not three. The three last-mentioned cases came under review in the Court of Appeal in *Graham v. Mayor, &c., of Newcastle-upon-Tyne* (1) and the Court of Appeal held, following *Burton v. Mayor, &c., of Salford*, and overruling *Taylor v. Meltham Local Board*, and *Kay v. Atherton Local Board*, that, in respect of acts done by a local authority as surveyors of highways, they are governed by and entitled to the limitation of the Highway Act, 1835.

Distress
for church
rates.

The Act 53 Geo. III. c. 127, giving amongst other things power to distrain for church rates, provided that every action or suit for anything done in pursuance of that Act should be commenced within three calendar months next after the fact committed, and not after (2). Where an irregular distress was made under this Act, it was held in an action of trespass that the three months ran from the sale and not from the seizure (3). This section is repealed by 36 & 37 Vict. c. 91, except as to any rate the payment of which may still be enforced by process of law.

County
Rate Act.

By the County Rate Act (4), it is provided that no action or suit shall be brought, commenced, or prosecuted against any person or persons for anything done or to be done by virtue of or in pursuance of the Act, after three calendar months next after the fact committed.

Customs
Acts.

By the Customs Consolidation Act, 1876 (5), as

(1) (1893), 1 Q. B. 643.

(2) Sect. 12.

(3) *Collins v. Rose*, 5 M. & W. 194, distinguishing *Godin v. Ferris*, 2 H. Bl. 14, *Crook v. McTavish*, 1 Bingh. 167; and *Saunders v. Saunders*, 2 East, 254.

(4) 15 & 16 Vict. c. 81, s. 44.

(5) 39 & 40 Vict. c. 36, s. 272.

amended by the Customs, Inland Revenue and Savings Banks Act, 1877 (1), every action against any officer and person therein mentioned for anything done in the execution of or by reason of his office, shall be commenced within two months next after the cause of action shall have arisen.

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By the Taxes Management Act, 1880 (2), an action against a commissioner, sheriff, sheriff deputy or substitute, clerk, surveyor, assessor, or collector, who shall act or be employed in the execution of that Act, the Tax Acts or Land Tax Acts, for anything done in pursuance of any of such Acts, must be commenced within six months next after the fact committed.

Taxes
Manage-
ment Act.

By the Inland Revenue Regulation Act, 1890 (3), an action against any commissioner, collector, or officer or person employed in relation to inland revenue, or against any person acting in the aid and assistance of any such commissioner, &c., must be commenced within three months next after the cause of action arose.

Inland
Revenue
Regulation
Act, 1890.

By 7 Vict. c. 19, s. 8, all actions against any bailiff of such inferior courts as are therein referred to for anything done in pursuance of his duty as bailiff, or for any grievance, nonfeazance or misfeazance as therein mentioned, must be commenced within three months after the fact committed.

Bailiffs of
Local
Courts.

By the County Courts Act, 1888 (4), all actions and prosecutions to be commenced against any person for anything done in pursuance of the Act shall be commenced within three months after the fact committed.

County
Courts
Act, 1888.

By the Poor Laws Amendment Act, 1834 (5), no action against any commissioner, assistant commissioner, or any other person for anything done in pursuance of or under the authority of the Act shall be commenced after

Poor Laws
Amend-
ment Act.

- (1) 40 Vict. c. 13, s. 4.
- (2) 43 & 44 Vict. c. 19, s. 20.
- (3) 53 & 54 Vict. c. 21, s. 28.
- (4) 51 & 52 Vict. c. 43, s. 53.
- (5) 4 & 5 Wm. IV. c. 76, s. 104.

PART IX. three months next after the act committed for which the
CH. I. action is brought.

Game Act, 1831. By the Game Act, 1831 (1), all actions and prosecutions to be commenced against any person for anything done in pursuance of the Act shall be commenced within six calendar months after the fact committed.

Cruelty to Animals Act, 1849. By the Cruelty to Animals Act, 1849 (2), no action shall be commenced against any justice or other person for anything done in pursuance or under the authority of that Act, unless commenced within six months after the fact committed.

Larceny Act, &c. By the Larceny Act, 1861 (3), the Malicious Injuries to Property Act, 1861 (4), and the Coinage Offences Act 1861 (5), all actions and prosecutions against any person, for anything done in pursuance of any of those Acts, must be commenced within six months after the fact committed.

Contagious Diseases (Animals) Act, 1878. By the Contagious Diseases (Animals) Act, 1878 (6), an action, prosecution or proceeding against a local authority, or an inspector or officer of the Privy Council or of a local authority, for any act done in pursuance or execution or intended execution of the Act, or of an Order in Council or regulation of a local authority, or in respect of any alleged neglect or default in the execution of the Act, or of such an order or regulation, must be commenced within four months after the act, neglect or default complained of; or in case of a continuance of injury or damage, within four months after the ceasing thereof.

Anatomy Act, 1832. By the Anatomy Act, 1832 (7), any action or suit against any person for anything done in pursuance of the Act must be commenced within six calendar months next after the cause of action accrued.

(1) 1 & 2 Wm. IV. c. 32, s. 47.

(2) 12 & 13 Vict. c. 92, s. 27.

(3) 24 & 25 Vict. c. 96, s. 113.

(4) 24 & 25 Vict. c. 97, s. 71.

(5) 24 & 25 Vict. c. 99, s. 33.

(6) 41 & 42 Vict. c. 74, s. 55.

(7) 2 & 3 Wm. IV. c. 75, s. 17.

By the Prison Act, 1865 (1), all actions, suits and prosecutions commenced against any person for anything done in pursuance of the Act must be commenced within six calendar months after the committal thereof.

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Prison Act,
1865.

By the Copyright Act, 1842 (2), all actions, suits, bills, indictments or informations for any offence committed against the Act, must be brought, sued and commenced within twelve calendar months next after the offence committed.

Copyright
Act, 1842.

By the Army Act, 1881 (3) (which is annually renewed), any action, prosecution or proceeding against any person for any act done in pursuance or execution or intended execution of the Act or in respect of any alleged neglect or default in the execution of the Act, must be commenced within twelve calendar months next after the act, neglect or default complained of; or in case of a continuance of injury or damage, within twelve months next after the ceasing thereof.

Army Act,
1881.

By the Foreign Jurisdiction Act, 1878 (4), an action, suit, prosecution or other proceeding against any person for any act done in pursuance or execution or intended execution of the Foreign Jurisdiction Acts, 1843 to 1878, or any of them, or of any Order in Council made under them, or of any such power or jurisdiction of Her Majesty as is mentioned in them or any of them, or in respect of any alleged neglect or default in the execution of the said Acts or any of them, must, if brought in any court within Her Majesty's dominions, be commenced within six months after the act, neglect or default complained of; or in case of a continuance of injury or damage, within six months after the ceasing thereof; or when the cause of action arises out of Her Majesty's dominions, within six months after the parties to such action, suit, prose-

Foreign
Jurisdiction
Act,
1878.

- (1) 28 & 29 Vict. c. 126, s. 50.
- (2) 5 & 6 Vict. c. 45, s. 26.
- (3) 44 & 45 Vict. c. 58, s. 170.
- (4) 41 & 42 Vict. c. 67, s. 8.

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—Habitual
Drunkards
Act, 1879.

cution or proceeding have been within the jurisdiction of the court in which the same is instituted.

By the Habitual Drunkards Act, 1879 (1), an action against any person for anything done in pursuance or execution or intended execution of the Act must be commenced within two years after the thing done.

Submarine
Telegraph
Act, 1885.

By the Submarine Telegraph Act, 1885 (2), every action, prosecution or proceeding against any officer for anything done in pursuance or execution or intended execution of the Act must be commenced within twelve months after the act, neglect or default complained of.

Lunacy
Act, 1890.

By the Lunacy Act, 1890 (3), an action brought by any person who has been detained as a lunatic for anything done under the Act must be commenced within twelve months after the release of the party bringing the action.

Post Office
(Offences)
Act, 1837.

By the Post Office (Offences) Act, 1837 (4), all legal proceedings, whether by action or prosecution against any person for anything done in pursuance of or under the Post Office Acts, must be commenced and prosecuted within three calendar months next after the commission of the act.

Municipal
Corpora-
tions Act,
1882.

By the Municipal Corporations Act, 1882 (5), an action, prosecution or proceeding against any person for any act done in pursuance or execution or intended execution of the Act, or in respect of any alleged neglect or default in the execution of the Act, must be commenced within six months after the act is done or omitted; or in case of a continuance of injury or damage, within six months after the ceasing thereof.

Actions
against
justices.

By 11 & 12 Vict. c. 44 (6), re-enacting a similar provision thereby repealed in 24 Geo. II. c. 44, no action

- (1) 42 & 43 Vict. c. 19, s. 31.
- (2) 48 & 49 Vict. c. 49, s. 6, subs. (3).
- (3) 53 Vict. c. 5, s. 331.
- (4) 7 Wm. IV. & 1 Vict. c. 36, s. 46.
- (5) 45 & 46 Vict. c. 50, s. 226.
- (6) Sect. 8.

can be brought against any justice of the peace for anything done by him in the execution of his office, unless the same be commenced within six calendar months next after the act complained of shall have been committed; and a similar provision is enacted for Ireland (1).

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Actions against metropolitan police magistrates or other persons acting under 2 & 3 Vict. c. 71 must be commenced within three months next after the act committed; or in case there is a continuation of damage, within three months after the doing or committing such damage shall have ceased (2).

Metropoli-
tan police
and magis-
trates.

By the Metropolis Management Amendment Act, 1862, every action or proceeding against the Metropolitan Board of Works (now the London County Council (3)), or any person acting under their direction for anything done under the Metropolis Management Acts, must be commenced within six months after the accrual of the cause of action or ground of claim or demand (4).

Metropoli-
tan Man-
agement
Amend-
ment Act,
1862.

By the Metropolitan Building Act, 1855 (5), an action against a district surveyor or *other person* for "anything done or intended to be done" under the provisions of the Act must be commenced within six months next after the accrual of the cause of action. This section only refers to persons who are *ejusdem generis* with a district surveyor, and does not include a person employed by a building owner to do work on his building (6).

Metropoli-
tan Build-
ing Act,
1855.

By 24 Geo. II. c. 44 (7), no action can be brought against any constable, head-borough, or other officer or person acting by his order and in his aid for anything

Constables.

(1) 12 Vict. c. 16, s. 8.

(2) Sect. 53; see *Barnett v. Cox*, 9 Q. B. 617.

(3) See 51 & 52 Vict. c. 41, s. 40, sub-s. 8.

(4) 25 & 26 Vict. c. 102, s. 106. See *Doust v. Slater*, 38 L. J. Q. B. 159, *post*, p. 597.

(5) 18 & 19 Vict. c. 122, s. 108.

(6) *Williams v. Golding*, L. R. 1 C. P. 69.

(7) Sect. 8.

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done in obedience to the warrant of a justice, unless commenced within six calendar months after the act committed (1).

Guardians.

By 22 & 23 Vict. c. 49, s. 1, any debt, claim or demand which may be lawfully incurred by or become due from the guardians of any union or parish or the board of management of any school or asylum district shall be paid within the half year in which the same shall have been incurred or become due, or within three months next after the expiration of such half year, unless the Poor Law Board (now the Local Government Board) extends the time. No action for such debt will lie after the expiration of three months from the end of such half year, unless the time of payment has been so extended (2), nor in such circumstances will a *mandamus* to pay such debt be granted (3). The statute, it will be noticed, limits the time for payment, not for bringing the action. It is therefore provided (4) that, if any person claiming any debt or demand shall commence proceedings within the period limited for payment, and prosecute such proceedings to judgment with due diligence, the judgment shall be satisfied, although recovered after the expiration of that period, and all proceedings by *mandamus* or otherwise for enforcing the judgment without delay are to be deemed proceedings within the operation of that section (5).

By sect. 9 of the Public Health Act, 1875 (6), the guardians of a rural union are to form the rural sanitary authority of the district, and all statutes, orders and legal provisions applicable to any board of guardians shall apply to them in their capacity of rural authority

(1) See *Parton v. Williams*, 3 B. & Ald. 338; *Gosden v. Elphick*, 4 Exch. 445; *Smith v. Wiltshire*, 5 Moore, 322; 2 B. & B. 619; *Freegard v. Barnes*, 21 L. J. Exch. 320; 7 Exch. 827.

(2) *Baker v. Billericay Union*, 2 H. & C. 642; 33 L. J. M. C. 40.

(3) *Reg. v. Stepney Union*, L. R. 9 Q. B. 383; 43 L. J. M. C. 145.

(4) Sect. 4.

(5) See *Rhodes v. Guardians of Pateley Bridge Union*, 51 L. T. 235.

(6) 38 & 39 Vict. c. 55.

under this Act for the purposes of this Act. In *Dearle v. Guardians of Petersfield Union* (1) it was decided that sect. 9 of the Act of 1875 did not extend the limitation of time fixed by sect. 1 of 22 & 23 Vict. c. 49, to debts contracted by guardians in their capacity of rural sanitary authority, but that the limitation only applied to debts contracted by the guardians as guardians.

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Every action against any local authority or any member thereof, or any officer of a local authority or person acting in his aid for anything done or intended to be done or omitted to be done under the provisions of the Public Health Act, 1875 (2), must be commenced within six months next after the accrual of the cause of action, and not afterwards. The limitation of six months under the Public Health Act, 1875, is in addition to and not in substitution for any other limitation which may be provided by statute (3). If a local authority has by a local Act powers independent of, though also conferred by, the Public Health Act, 1875, and the local Act gives a shorter period of limitation than the Public Health Act, 1875, then, in the absence of proof that the local authority has committed the act complained of under the Public Health Act, it will not be assumed that it has done so, and the local authority will be entitled to avail itself of the shorter period of limitation (4).

Public
Health
Act, 1875.

By sect. 10 of the Public Health Act, 1875 (2), where any local Act other than an Act for the conservancy of any river is in force within the district of an urban authority conferring on any commissioners, trustees or other persons powers for purposes the same as or similar to those of that Act, all the powers, rights, duties, capabilities, liabilities and obligations of such commissioners,

(1) 21 Q. B. D. 447.

(2) 38 & 39 Vict. c. 55, s. 264. See *Crumbie v. Wallsend Local Board*, (1891), 1 Q. B. 503, and *post*, pp. 589, 594, 599.

(3) See sects. 340 and 341, and *Graham v. Mayor, &c., of Newcastle-upon-Tyne* (1893), 1 Q. B. 643.

(4) *Burton v. Mayor and Corporation of Salford*, 11 Q. B. D. 286. See *ante*, p. 578.

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trustees or other persons in relation to such purposes shall be transferred to and attach to the said urban authority. The effect of this section is to reconstitute such commissioners or other persons new bodies under the Act and to give them the power of the Act as well as those conferred by the local Act; such commissioners are accordingly entitled to the protection of sect. 264 of the Act of 1875 (1).

Local and
personal
Acts.

The time limited by the various local and personal Acts are, of course, almost as various as the Acts themselves, but the Act 5 & 6 Vict. c. 97 contains the following provisions (2):—

“And whereas divers Acts, commonly called public local and personal, or local and personal Acts, and divers other Acts of a local and personal nature contain clauses limiting the time within which actions may be brought for anything done in pursuance of the said Acts respectively; and whereas the periods of such limitations vary very much, and it is expedient that there should be one period of limitation only; be it therefore enacted that from and after the passing of this Act the period within which any action may be brought for anything done under the authority or in pursuance of any such Act or Acts shall be two years, or in case of continuing damage, then within one year after such damage shall have ceased; and that so much of any clause, provision or enactment by which any other time or period of limitation is appointed or enacted shall be and the same is hereby repealed” (3).

This provision is therefore substituted for all provisions as to the limitation of actions in all public local and personal or local and personal Acts, or Acts of that nature, which had been passed before the 10th August,

(1) *Lea v. Facey*, 17 Q. B. D. 139; 19 Q. B. D. 352.

(2) Sect. 5.

(3) See *Richards v. Easto*, 15 M. & W. 244; *Cock v. Gent*, 12 M. & W. 234; *Moore v. Shepherd*, 10 Exch. 424; *Shepherd v. Sharp*, 1 H. & N. 115; 25 L. J. Exch. 254.

1842, the day when the Act of 5 & 6 Vict. c. 97 was passed ; but it would seem not to apply to any subsequent Acts (1).

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It should be observed that in every Act passed after 1850, unless the contrary intention appears, month means calendar month (2).

It will be noticed that in many of the public Acts referred to above the time runs not from the accrual of the cause of action, but from the "time of the act or fact committed," and it is believed that this was the most usual expression in local and personal Acts, and hence, questions have frequently arisen whether time begins to run from the time of the committal of the act which causes the damage, or from the time when the damage happened. It is clear from the case of *Whitehouse v. Fellowes* (3), in which most of the former cases on the subject were referred to, that for this purpose the words "from the act or fact committed," must be treated as substantially the same as "from the accrual of the cause of action," and that, if the cause of action, as laid, is the happening of the damage and not the mere doing of the act which causes the damage, the principle laid down in *Bonomi v. Backhouse* in the Exchequer Chamber (4), which was subsequently confirmed by the House of Lords (5), and followed by the House of Lords in the *Darley Main Colliery Co. v. Mitchell* (6), will apply, and time will run, not from the doing of the act, but from the happening of the damage.

When time
begins to
run.

Whitehouse v. Fellowes was a case under the General Turnpike Act (7). The trustees under their powers had

(1) *Boden v. Smith*, 18 L. J. C. P. 121 ; *Carr v. Royal Exchange Assurance*, 31 L. J. Q. B. 93.

(2) 52 & 53 Vict. c. 63, s. 3.

(3) 10 C. B. N. S. 765.

(4) E. B. & E. 646 ; 28 L. J. Q. B. 378.

(5) 9 H. L. 503 ; 34 L. J. Q. B. 181.

(6) 11 App. Cas. 127. See *Crumbie v. Wallsend Local Board* (1891), 1 Q. B. 503 ; *Fairbrother v. Bury Rural Sanitary Authority*, 37 W. R. 544.

(7) 3 Geo. IV. c. 126, s. 147.

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turned an open drain into a culvert not sufficient to take away the surface water in heavy rains, and by so doing caused such water from time to time to percolate into and flood the plaintiff's colliery. This had been the case for some few years, but in November and December, 1859, the colliery was so flooded it could not be worked, and it was held that an action commenced on January 19th, 1860, the period of limitation fixed by the Act being three months, was in time.

It must be observed that by the Act 5 & 6 Vict. c. 97, two periods of limitation are given, two years from the act done, but in the case of continuing damage, one year from the ceasing of the damage. Now where, as in *Bonomi v. Backhouse*, the circumstances are such that the act done would not appear to be in itself a trespass, and damage subsequently accrues, once for all, as the consequence of such act, it would seem clear that the time of limitation would be two years from the damage (1); but there may be many cases in which it would be difficult to decide which period of limitation applies.

In an action against a justice for false imprisonment, as every continuance of the imprisonment is in law a new imprisonment, an action may be commenced at any time within six months from the end of the imprisonment, and the last day of the imprisonment is excluded in computing the six months (2).

Illegal
distress of
goods for
canal tolls.

A canal company had by their special Act power to distrain for unpaid tolls. The Act required that actions for anything done in pursuance thereof should be commenced within six months next after the fact committed, or, in case of a continuation of damages, then within six months next after the doing such damage should have ceased. The owner of a colliery and barges

(1) See *Crumbie v. Wallsend Local Board* (1891), 1 Q. B. 503; *Fairbrother v. Bury Rural Sanitary Authority*, 37 W. R. 544.

(2) *Hardy v. Ryle*, 9 B. & C. 603; see also *Bailey v. Warden*, 4 M. & S. 400.

mortgaged them to the plaintiff and afterwards demised the property to a lessee. The company wrongfully distrained, and afterwards sold some of the barges and a quantity of coal the produce of the colliery. The action was commenced more than six months after the seizure, but within six months of the sale. It was held that the plaintiff's right of action was not barred, as he suffered no damage till the goods distrained were sold (1); although the lessee, being in possession of the property, might have been barred at the end of six months from the seizure. If the lessee had been the plaintiff, "the Court might have found it difficult to say that his resorting to an action of trover instead of trespass could have extended his rights" (2).

In another case (3), the defendants, who were acting under statutory powers, were sued for injury done to the plaintiff's trade by keeping up an authorised obstruction for an unreasonable time, namely, for three months, from 2nd April to 2nd July, and the action was commenced on 30th December; the statute under which the defendants acted provided that no action should be brought against any person for anything done in pursuance of the act "after six months after the cause of action shall have arisen;" it was held that the plaintiff could only recover damage for the 1st and 2nd July, the two days of the grievance which were within six months of 30th December.

Unau-
thorised
acts under
statute.

An Act authorised a railway company to divert the plaintiff's canal and provided that, in case of obstruction of the canal, the railway company should pay to the canal company by way of ascertained damages a certain sum for every hour during which the obstruction should continue, and that on default of payment on demand the

(1) *Fraser v. Swansea Canal Co.*, 1 Ad. & El. 354.

(2) *Ib.* p. 371.

(3) *Wilkes v. Hungerford Market Co.*, 2 Bingh. N. C. 281 (overruled, but not on this point, by *Ricket v. Metropolitan Railway Co.* L. R. 2 H. L. 187). See *Blakemore v. Glamorganshire Canal Co.*, 3 Y. & J. 60.

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canal company might recover the sum by action. It was also enacted that no action should be brought for anything done or omitted to be done in pursuance of the Act or in the execution of the powers and authorities conferred by the Act, unless the action should be brought within six calendar months next after the act committed, or, if there should be a continuation of the damage, within six calendar months next after the doing the damage, should have ceased. The defendants obstructed the canal; a demand was served on them; within six months after the demand, but more than six months after the obstruction had ceased, the plaintiffs sued the defendants, and it was held that the action was too late (1).

What is
done under
the auth-
ority of the
Acts.

Questions have frequently arisen as to what acts are to be considered as done under the authority of the special statute in question so as to be within its protection. Most of the statutes that provide a special period of limitation also at the same time make notice of action necessary, and the decisions on the question whether a person sued is entitled to notice of action are of course decisions on the question whether such a person is entitled to the benefit of the special period of limitation prescribed by the Act.

In the case of a private person or company to whom special powers to carry out particular works are given by statute, and who is sued for some act not authorised by the statute, the defendant is generally entitled to the notice of action and to the limitation of time provided by the protecting clause, if in doing the act complained of he was intending to carry out the particular works contemplated by the statute. And it has been held that a company was entitled to this protection though the acts complained of had been done improperly and in bad faith (2).

(1) *Kennet & Avon Canal Co. v. Great Western Railway Co.*, 7 Q. B. 824.

(2) *Lord Oakley v. Kensington Canal Co.*, 5 B. & Ad. 138; but see *Reg. v. Eastern Counties Railway*, 1 G. & D. at p. 592.

The general rule with regard to private persons who claim the protection of a clause in a general Act for anything done under the Act, is that a defendant is within the protection, if he believed in the existence of a state of facts which, if it had existed, would have justified him in doing as he did (1). It is not necessary that the defendant, when doing the act complained of, should have the statute in his mind or have known of its existence (2).

A public officer acting in execution of an Act of Parliament is entitled to the protection given to persons acting in pursuance of the Act, if he reasonably and honestly believed that he was authorised by the Act to do the thing complained of, although he may have been mistaken in his view of the powers conferred by the statute (3).

In *Hughes v. Buckland* (4), the defendants were servants of the owner of a private fishery; the statute 7 & 8 Geo. IV. c. 29 (now repealed) empowered the owner of a private fishery and his servants to demand from any person found fishing in such fishery against the provisions of the Act, any rods, lines, and nets in his possession; and if he should not immediately deliver them up, to take them from him and to apprehend him without warrant; the Act also provided a special period of limitation, and made notice of action necessary in any action against any person for anything done in pursuance of the Act. The defendants had apprehended the plaintiff while fishing in a place which the jury found to be outside the limits of the private fishery, but the jury also found that the defendants *bonâ fide* and reasonably believed the place in question to be within

(1) *Chamberlain v. King*, L. R. 6 C. P. 474.

(2) *Roberts v. Orchard*, 2 H. & C. 769; 33 L. J. Ex. 65.

(3) *Hardwick v. Moss*, 7 H. & N. 136; 31 L. J. Ex. 205; *Graves v. Arnold*, 3 Campb. 242; *Irving v. Wilson*, 4 T. R. 485; *Greenway v. Hurd*, 4 T. R. 553; see *Burns v. Nowell*, 5 Q. B. D. 444.

(4) 15 M. & W. 346.

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the limits of the private fishery. It was held that the statute applied to those who *bonâ fide* and reasonably believed that they were acting under the statute, although in fact they were not, and that the defendants were entitled to the protection of the section which provided for notice of action and a special period of limitation. In such a case it is not necessary that the person claiming the protection of the statute should have had reasonable grounds for his belief; the question for the jury is—did the defendant believe honestly in the existence of those facts which, if they had existed, would have justified his doing as he did? (1). The case of *Hughes v. Buckland* was followed in *Lea v. Facey* (2), where the Court of Appeal held that a person who was not in fact legally a member of a local authority, but who *bonâ fide* believed himself to be such, was entitled to the protection of sect. 264 of the Public Health Act, 1875.

An action was brought against a canal company for diverting the water of certain streams. The defendants were empowered by Act of Parliament to supply their canal with water from all streams within a certain distance, but were prohibited from taking water from certain specified streams during certain months of the year, except that water might be taken from one of these streams when it overflowed. The action was referred, and the award found that the water had been taken from the specified streams during the prohibited months and when the excepted stream was not overflowing, and that the taking such water was prohibited by and not done in pursuance of the Act, which provided a special period of limitation for anything done in pursuance of the Act or in the execution of the powers and authorities granted by the Act. The Court of King's Bench held that the

(1) *Hermann v. Seneschal*, 13 C. B. N. S. 392; 32 L. J. C. P. 43; *Roberts v. Orchard*, 2 H. & C. 769; 33 L. J. Exch. 65; *Chamberlain v. King*, L. R. 6 C. P. 474, explaining *Leete v. Hart*, L. R. 3 C. P. 322; but see *Agnew v. Jobson*, 47 L. J. M. C. 67.

(2) 19 Q. B. D. 352.

award was bad, that the taking of the water might be so far a thing done in the execution of the powers and authorities given by the Act as to entitle the company to the protection of the Act (1).

In *Selmes v. Judge* (2), the defendants, who were surveyors of highways, had made an illegal rate under a repealed statute, and were sued by a person who had paid the rate for a return of the money paid; the defendants relied on the protection of the Highway Act, 1835 (3), and the Court of Queen's Bench held that they were entitled to it on the ground that, in acting as they had done, they *bonâ fide* believed that they were doing what the law allowed, and that though they had intended to act under a repealed statute which gave them no protection, yet they were entitled to the protection of the statute under which they did in fact act.

A person acting under statutory powers may erroneously exceed the powers given or inadequately discharge the duties imposed by the statute, yet if he acts *bonâ fide* in order to execute such powers or to discharge such duties, he is to be considered as acting in pursuance of the Act, and is to be entitled to the protection conferred upon persons whilst so acting (4).

The Larceny Act, 1861 (5), s. 103, enables any person to "immediately" apprehend without a warrant any person found committing an offence under the Act; where a person is sued for arresting another person without a warrant, the defendant cannot obtain the protection of the section of the Act which fixes a period of limitation (6), unless it is found as a fact that the arrest was immediate, and that the defendant *bonâ fide* believed

(1) *Gaby v. Wilts & Berks Canal Co.*, 3 M. & S. 580.

(2) L. R. 6 Q. B. 724.

(3) 5 & 6 Wm. IV. c. 50, s. 109; see p. 578.

(4) *Smith v. Shaw*, 10 B. & C. 277; see *Theobald v. Crichmore*, 1 B. & Ald. 227.

(5) 24 & 25 Vict. c. 96. s. 103.

(6) Sect. 113.

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Acts done
by justices
in the
execution
of their
office.

that the person arrested had committed an offence under the Act (1).

With respect to actions against justices, a justice is entitled to the protection of 11 & 12 Vict. c. 44, s. 8 (2), even if he exceeds his jurisdiction, provided he *bonâ fide* believes that he is acting in pursuance of his lawful authority; and if he acts within his jurisdiction, he is entitled to such protection, even though he acts maliciously and without probable cause (3).

In *Umpfelby v. McLean* (4), which was an action to recover the amount of an excessive charge made by the defendants as collectors of taxes for their expenses upon a distress for arrears, it was held that the protection of sect. 70 of 43 Geo. III. c. 99 (now sect. 20 of the Taxes Management Act, 1880), fixing a limitation of six months "after the fact committed" for "anything done" in pursuance of the Act, only applies to cases in which some positive act is done, and did not apply to a mere case of non-feasance, like the non-return of money in respect of which the action in question was brought. This case was followed quite recently by the Court of Appeal (5), who held that the phrase "anything done" in sect. 8 of the Justices Protection Act, 1844 (6), did not apply to words spoken; consequently, where a member of a County Council, to which, by the Local Government Act, 1888 (7), the administrative business of justices in quarter sessions had been transferred along with the rights, privileges and immunities of justices, was sued for slanderous words spoken by him at a meeting of the

(1) *Griffith v. Taylor*, 2 C. P. D. 194.

(2) See *ante*, p. 584.

(3) *Hazeldine v. Grove*, 3 Q. B. 997, 1007; *Kirby v. Simpson*, 10 Ex. 358; 23 L. J. M. C. 165; *Lawrenson v. Hill*, 10 Ir. C. L. R. 498, 504; see *Prestidge v. Woodman*, 1 B. & C. 12; *Weller v. Tuke*, 9 East. 364; *Morgan v. Palmer*, 2 B. & C. 729; *Agnew v. Jobson*, 47 L. J. M. C. 67.

(4) 1 B. & Ald. 42.

(5) *Royal Aquarium v. Parkinson* (1892), 1 Q. B. 431.

(6) 11 & 12 Vict. c. 44.

(7) 51 & 52 Vict. c. 41, ss. 3, 28, 78, 100.

Council for the conduct of such business, it was held that sect. 8 of the Justices Protection Act, 1844 (1), had no application.

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It has been decided that the section of the Metropolis Management Amendment Act, 1862 (2), which provides a special period of limitation for actions or proceedings against the Metropolitan Board of Works (now the London County Council) or any vestry or district board or any person acting under their direction for anything done under the Metropolis Management Acts, does not apply to proceedings to obtain compensation for injuriously affecting land by the execution of the powers given by the Act. The section applies only to proceedings of a hostile character against the persons protected, and does not apply to proceedings the object of which is to ascertain what amount the Metropolitan Board of Works (now the London County Council) ought to pay (3). Neither does the section apply to a person who is not acting under the orders or directions of a district board, but who commits a trespass while making a drain in pursuance of a notice received from the board (4). But where a contractor, who had been employed by the Metropolitan Board of Works to enlarge a sewer, neglected to pump the water out of the sewer, and in consequence the plaintiff's property was injured, it was held that the neglect to pump was "a thing done or intended to be done" under the provisions of the Act, and the contractor was entitled to the protection of sect. 106 (5). In *Whatman v. Pearson* (6), a contractor employed by a district board was sued for negligence, his servant having left a horse and cart unattended in the

Metropolis
Manage-
ment Acts.

(1) 11 & 12 Vict. c. 44. See *ante*, p. 584.

(2) 25 & 26 Vict. c. 102, s. 106; see p. 585.

(3) *Delany v. Metropolitan Board of Works*, L. R. 2 C. P. 532; L. R. 3 C. P. 111.

(4) *Doust v. Slater*, 38 L. J. Q. B. 159.

(5) *Poulsum v. Thirst*, L. R. 2 C. P. 449.

(6) L. R. 3 C. P. 422.

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street at a considerable distance from the place where the defendant's work was being carried on; the horse ran away and damaged the plaintiff's property; the defendant relied upon the protection of sect. 106 of the Metropolis Management Amendment Act, 1862 (1); Byles, J., left to the jury the question whether the injury complained of was a thing done or intended to be done under the Act; the jury found that it was not, and the Court of Common Pleas refused to disturb the verdict, holding that the negligence complained of was collateral to "anything done or intended to be done."

In *Edwards v. Vestry of St. Mary, Islington* (2), the plaintiff was a driver employed by contractors who had contracted with the defendants to provide horses and drivers for carts used in watering the streets under the Metropolis Management Act, 1855 (3); the defendants negligently supplied a cart with a defective axle, and in consequence the plaintiff was injured; it was held that the defendants were entitled to the protection of sect. 106 of 25 & 26 Vict. c. 102, the action being for something "done or intended to be done" under the powers of the defendants under the Metropolis Management Act, 1855.

Public
body
acting
under a
statute.

Where a statute imposes a duty upon a public body, the omission to do something that ought to be done in order to completely perform the duty, or the continuing to leave any such duty unperformed, amounts to "an act done or intended to be done" within the meaning of the section of the statutes which provide for a period of limitation and for notice of action (4).

The protection of sect. 264 of the Public Health Act,

(1) 25 & 26 Vict. c. 102; see p. 585.

(2) 22 Q. B. D. 338.

(3) 18 & 19 Vict. c. 120, s. 116.

(4) *Wilson v. Mayor and Corporation of Halifax*, L. R. 3 Exch. 114; *Jolliffe v. Wallasey Local Board*, L. R. 9 C. P. 62; *Poulsum v. Thirst*, L. R. 2 C. P. 449; *Holland v. Northwich Highway Board*, 34 L. T. 137.

1875 (1), relating to actions "for anything done or intended to be done or omitted to be done under the provisions" of the Act includes an action to recover money which a Local Board had wrongly demanded and received from the plaintiff under a mistaken view of their rights under the Act; the section is not confined to actions of tort (2). But the section does not apply to things done or omitted to be done under specific contracts (3). And the section does not apply to actions for the recovery of land (4).

Most of the public Acts which provide a limitation for things done under their powers also enable the defendant to plead the general issue and give the special matter in evidence, so that in such cases the defendant need not plead the statute. It was, it is believed, almost universally the practice to insert a similar provision in the local and personal Acts, but by the Act 5 & 6 Vict. c. 97, all provisions in such Acts enabling a defendant to plead the general issue are repealed (5).

General
issue.

It will be observed that in none of these enactments that provide a special period of limitation are there any provisions for disabilities.

(1) See *ante*, p. 587.

(2) *Midland Railway Co. v. Withington Local Board*, 11 Q. B. D. 788. See *Waterhouse v. Keen*, 4 B. & C. 200.

(3) *Midland Railway Co. v. Withington Local Board*, 11 Q. B. D. at p. 794; see *Davis v. Mayor of Swansea*, 8 Exch. 808; 22 L. J. Exch. 297; and *Dearle v. Guardians of Petersfield Union*, 21 Q. B. D. at p. 452.

(4) *Foat v. Mayor of Margate*, 11 Q. B. D. 299.

(5) Sect. 3; see *ante*, p. 588, and *Carr v. Royal Exchange Assurance*, 31 L. J. Q. B. 93.

CHAPTER II.

CONSTRUCTION OF THE STATUTES OF LIMITATIONS.

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CH. II.
—

IT has been thought useful to collect together in this chapter a few of the remarks made by judges as to the principles which govern the interpretation of the Statutes of Limitations.

Uniform
construc-
tion of
Statutes of
Limita-
tions.

Firstly, it has been laid down that "the several Statutes of Limitations, being all *in pari materiâ*, ought to receive a uniform construction, notwithstanding any slight variation of phrase, the object and intention being the same" (1).

Beneficial
construc-
tion of
Statutes of
Limita-
tions.

Secondly, it has often been laid down that the Statutes of Limitations are beneficial statutes, and are to be construed liberally and not strictly. Lord Kenyon, C.J., in a case which arose under the Statute of Fines, spoke of the Statutes of Limitations as "a very beneficial system of statutes," and as being "of the greatest importance, inasmuch as they are statutes of repose." This passage has frequently been referred to with approval by other eminent judges. Dallas, C.J., in a case which arose under the section of 21 Jac. c. 16, relating to real property (2), says: "I cannot agree in the position that statutes of this description ought to receive a strict construction; on the contrary, I think they ought to receive a beneficial construction, with a view to the

(1) *Per* Abbott, C.J. *Murray v. The East India Co.*, 5 B. & Ald. 215. See *Doe d. Duroure v. Jones*, 4 T. R. at p. 308; *Tolson v. Kaye*, 3 B. & B. 227.

(2) *Tolson v. Kaye*, *ubi supra*.

mischiefs intended to be remedied, and this is pointed out by the very first words of the statute, which are, 'For quieting of men's estates and avoiding of suits.' It is, therefore, that this statute, and all others of this description, are termed by Lord Kenyon statutes of repose, and long before and since the passing of this statute, this has been the principle which has guided the courts in the construction of them." Park, J., in the same case, in giving judgment expressed his concurrence with these remarks of Dallas, C.J. Best, C.J., speaking of the part of the statute of James which is still in force, says (1): "It is, as I have heard it often called by great judges, *an act of peace*." And the same expression is used by Bramwell, B., when he speaks of the Statute of Limitations, "which I value very highly as a *statute of peace*" (2). Wilmot, J., says of the same Act: "The Statute of Limitations ought to be construed liberally. I think it a noble, beneficial Act" (3). Maule, J. (4), says of the statute of James: "It is to be construed with liberality." Serjeant Williams (5), in a passage which was quoted with approval by Gaselee, J. (6), says of the same statute: "It is an extremely beneficial law, on which, as it has been observed, the security of all men depends, and is therefore to be favoured." If the statute is to be construed liberally, it follows that the exceptions in the statute should be construed strictly. And Ashurst, J., speaking of the exception of disabilities in the statute of James (7), says: "This statute having been always considered as a beneficial law for the public, we ought not to extend the exceptions in it to a case which does not require it."

(1) *A'Court v. Cross*, 3 Bingh. at p. 332.

(2) *Hunter v. Gibbons*, 26 L. J. Exch. at p. 5.

(3) *King v. Walker*, 1 W. Bl. 287.

(4) *Lafond v. Ruddock*, 13 C. B. at p. 820.

(5) 2 Wms. Saund. 64 f. note.

(6) *Scales v. Jacob*, 3 Bingh. at p. 645.

(7) *Perry v. Jackson*, 4 T. R. at p. 519.

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Traces no doubt of a contrary tendency are to be found in some of the decisions on the statutes, and expressions are to be found in favour of a strict interpretation of their provisions (1); but it is submitted that such expressions are contrary to the weight of authority. The defence of the statute may or may not, according to the circumstances of the case, be an honest defence, and this would be taken into account whenever a defendant has to ask for the indulgence of the Court in order to avail himself of the defence of the statute, as, for example, where he has omitted to plead the statute and wishes to amend and plead it. But the Courts, in spite of observations made by some learned judges (2), have generally leant in favour of the defence of the statute (3). Thus, while a plaintiff is not allowed to amend his pleadings so as to add a cause of action against which the statute has run since the issue of the writ (4); and while a renewal of a writ to save the bar of the statute will not be allowed unless it is applied for within the prescribed time (4), and the Court will not extend the time, yet, on the other hand, instances are to be found where a defendant, who has omitted to avail himself of the defence of the statute, has been allowed to amend and plead it (5). Moreover, in actions for the recovery of land and in penal actions, the defendant need not plead the statute at all, and the plaintiff will fail unless he shows on his pleadings a cause of action against which the statute has not run (6). And, lastly, the Courts of Equity, in cases where they were not bound by the statutes, adopted

(1) *Per* Lord Cranworth, L.C., *Roddam v. Morley*, 1 De G. & J. 1; *per* Lord Coleridge, C.J., *Hudson v. Fernyhough*, 61 L. T. 723.

(2) See *per* Lord Mansfield, C.J., *Quantock v. England*, 5 Burr. 2628; *per* Lindley, L.J., *Stamford, Spalding and Boston Banking Co. v. Smith*, 1892, 1 Q. B. at p. 770; *per* Cotton, L.J., in *re Baker. Nichols v. Baker*, 44 Ch. D. 270.

(3) *Green v. Rivett*, 2 Salk. 422.

(4) See *ante*, p. 560.

(5) See *ante*, p. 558.

(6) See *ante*, p. 544

periods of limitations based on the analogy of the statutes. And although an executor may pay a statute-barred debt, and commits no *devastavit* in omitting to avail himself of the statute; yet in a recent case, where a creditor took out an originating summons for the administration of the testator's estate and one of the two executors supported the summons, but the other opposed on the ground that the debt was statute-barred, and the summons was dismissed on that ground, and the executor who supported the summons afterwards paid the debt to the creditor, it was held in an action brought against the executor who had paid by the executor who had opposed, that the payment of the debt was a wrongful act and a *devastavit* for which the executor who had paid was personally liable (1).

Thirdly, it has been laid down that the statute of James is applicable to procedure only (2). And on the principle laid down above by Lord Kenyon the same rule would apply to all the Statutes of Limitations except that part of the 3 & 4 Wm. IV. c. 27, which deals with the extinction of title.

Statute of
James
applicable
to proce-
dure only.

(1) *Midgley v. Midgley*, W. N. 1893, 79; 41 W. R. 659.

(2) Per Jervis, C.J., *Lafond v. Ruddock*, 13 C. B. at p. 820; see *Ruckmaboye v. Lulloobhoy Mottichund*, 8 Moore, P. C. 4.

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31 ELIZ. C. 5, s. 5.

An Act concerning Informers.

Limita-
tion of
actions on
penal
statutes;
two years
for the
Crown, and
one year
for a *qui
tam* in-
former.

5. And . . . all actions, suits, bills, indictments or informations which, after twenty days after the end of this session of Parliament, shall be had, brought, sued or exhibited for any forfeiture upon any statute penal, made or to be made, whereby the forfeiture is or shall be limited to the Queen, her heirs or successors only, shall be had, brought, sued or exhibited within two years next after the offence committed or to be committed against such Act penal, and not after two years, and all actions, suits, bills or informations, which after the said twenty days shall be had, brought, sued or commenced, for any forfeiture upon any penal statute, made or to be made, except the Statute of Tillage, the benefit and suit whereof is or shall be by the said statute limited to the Queen, her heirs or successors, and to any other which shall prosecute in that behalf, shall be had, brought, sued or commenced, by any person that may lawfully pursue for the same as aforesaid, within one year next after the offence committed or to be committed against the said statute, and in default of such pursuit, then the same shall be had, sued, exhibited or brought, for the Queen's Majesty, her heirs or successors, at any time within two years after that year ended, and if any action, suit, bill, indictment or information for any offence against any penal statute made or to be made except the Statute of Tillage, shall be brought after the time

p. 511.

in that behalf before limited, then the same shall be void and of none effect, any Act or statute made to the contrary notwithstanding.

Provided always that where any action, information, indictment or other suit is or shall be limited by any statute penal to be had, sued, commenced or brought within shorter time than is before rehearsed, that in every such case the action, information, indictment or other suit shall be brought within the time limited by such statute.

Except where a shorter time is expressly limited.

21 JAC. I. C. 16, ss. 3, 4 & 7.

An Act for Limitation of Actions and for avoiding of Suits in Law.

Limitation of time within which certain personal actions shall be brought, viz :—

Actions on the case, account, trespass, replevin, &c., within six years.

Assaults, &c., within four years.

For words within two years.

In case of reversal of judgment for error, &c., new action

3. All actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action *sur trover*, and replevin for taking away of goods and cattle, all actions of account and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rents, and all actions of assault, menace, battery, wounding and imprisonment, or any of them which shall be sued or brought at any time after the end of this present session of Parliament shall be commenced and sued within the time and limitation hereinafter expressed, and not after (that is to say) the said actions upon the case (other than for slander), and the said actions for account, and the said actions for trespass, debt, detinue and replevin for goods or cattle, and the said action of trespass *quare clausum fregit* within three years next after the end of this present session of Parliament, or within six years next after the cause of such actions or suit and not after; and the said actions of trespass, of assault, battery, wounding, imprisonment or any of them, within one year next after the end of this present session of Parliament, or within four years next after the cause of such actions or suit, and not after; and the said actions upon the case for words, within one year after the end of this present session of Parliament, or within two years next after the words spoken and not after.

4. And, nevertheless, be it enacted that if in any of the said actions or suits judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff, that he take nothing

p. 3.

p. 563.

by his plaint, writ or bill, or if any the said actions shall be brought by original, and the defendant therein be outlawed and shall after reverse the outlawry, that in all such cases the party plaintiff, his heir, executors or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed, or such judgment given against the plaintiff or outlawry reversed, and not after.

may be brought within one year.

p. 54.

7. Provided, nevertheless, that if any person or persons that is or shall be entitled to any such action of trespass, detinue, action *sur trover*, replevin, actions of accounts, actions of debts, action of trespass for assault, menace, battery, wounding or imprisonment, actions upon the case for words, be or shall be at the time of any such cause of action given or accrued, fallen or come, within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned or beyond the seas, that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited after their coming to or being of full age, discover, of sane memory, at large and returned from beyond the seas, as other persons having no such impediment should have done.

Infants, &c., may bring such personal actions within the several periods after their disability ceases.

4 & 5 ANNE, C. 3 (ALSO CALLED 4 ANNE, C. 16), SS. 17, 18 & 19.

*An Act for the Amendment of the Law and the better
Advancement of Justice.*

Limita-
tions of
suits for
seamen's
wages.

17. All suits and actions in the Court of Admiralty for seamen's wages, which shall become due after the said first day of Trinity term (i.e. 1706) shall be commenced and sued within six years next after the cause of such suits or actions shall accrue and not after.

p. 14.

Proviso for
plaintiffs
in respect
of infancy,
&c., in such
suits.

18. Provided nevertheless . . . that if any person or persons who is or shall be entitled to any such suit or action for seamen's wages be or shall be at the time of any such cause of suit or action accrued, fallen or come, within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned or beyond the seas, that then such person or persons shall be at liberty to bring the same actions so as they take the same within six years next after their coming to or being of full age, discover, of sane memory, at large and returned from beyond the seas.

p. 54.

And for
defendants
beyond sea
in such
suits, and
also in
actions of
trespass,
detinue,
&c.

19. And . . . if any person or persons against whom there is or shall be any such cause of suit or action for seamen's wages or against whom there shall be any cause of action of trespass, detinue, action *sur trover*, or replevin for taking away goods or cattle, or of action of account or upon the case or of debt grounded upon any lending or contract without specialty, of debt for arrearages of rent, or assault, menace, battery, wounding and imprisonment or any of them be or shall be at the time of any such cause of suit or action given or accrued, fallen or come, beyond the seas, that then such person or persons who is or shall be entitled to any such suit or action shall be at liberty to bring the said actions against such person and persons after their return from beyond the seas, so as they take the same after their return from beyond the seas, within such times as are respectively limited for the bringing of the said actions before by this Act and by the said other Act made in the one-and-twentieth year of the reign of King James the First.

p. 55.

9 GEO. III. C. 16 (NULLUM TEMPUS ACT).

An Act to amend and render more effectual an Act made in the Twenty-first Year of the Reign of King James the First, intituled "An Act for the general Quiet of the Subjects against all Pretences of Concealment whatsoever."

WHEREAS an Act of Parliament was made and passed in the twenty-first year of the reign of King James the First, intituled "An Act for the general quiet of the subjects against all pretences of concealment whatsoever," and thereby the right and title of the King, his heirs and successors, in and to all manors, lands, tenements, tithes, and hereditaments (except liberties and franchises) were limited to sixty years next before the beginning of the said session of Parliament; and other provisions and regulations were therein made for securing to all his Majesty's subjects the free and quiet enjoyment of all manors, lands, and hereditaments which they or those under whom they claimed respectively had, held, or enjoyed, or whereof they had taken the rents, revenues, issues, or profits for the space of sixty years next before the beginning of the said session of Parliament: And whereas the said Act is now by efflux of time become ineffectual to answer the good end and purpose of securing the general quiet of the subjects against all pretences of concealment whatsoever: Wherefore be it enacted by the King's most excellent Majesty, by and with the assent and consent of the Lords spiritual and temporal, and the Commons, in this present Parliament assembled, and by the authority of the same, that the King's Majesty, his heirs or successors, shall not at any time hereafter sue, impeach, question, or implead any person or persons, bodies politic or corporate, for or in anywise concerning any manors, lands, tenements, rents, tythes, or hereditaments whatsoever (other than liberties or franchises), or for or in anywise concerning the revenues,

Preamble.

Act 21 Jac.
1, c. 2.

The Crown
shall not
sue or im-
plead any
person for
any
manors,
lands, or

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heredita-
ments, &c.,
where the
right hath
not or shall
not first
accrue and
grow with-
in sixty
years next
before the
commenc-
ing such
suit, &c. ;

and the
subject
secured in
the free and
quiet en-
joyment
thereof, as
well
against the
Crown, &c.,

issues, or profits thereof, or make any title, claim, challenge, or demand of, in, or to the same or any of them, by reason of any right or title which hath not first accrued and grown or which shall not hereafter first accrue and grow within the space of sixty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced for recovering the same, or in respect thereof, unless his Majesty, or some of his progenitors, predecessors, or ancestors, heirs or successors, or some other person or persons, bodies politic or corporate, under whom his Majesty, his heirs or successors, any thing hath or lawfully claimeth or shall have or lawfully claim, have or shall have been answered, by force and virtue of any such right or title to the same, the rents, revenues, issues, or profits thereof, or the rents, issues, or profits of any honour, manor, or other hereditament whereof the premises in question shall be part or parcel, within the said space of sixty years, or that the same have or shall have been duly in charge to his Majesty, or some of his progenitors, predecessors, or ancestors, heirs, or successors, or have or shall have stood insuper of record, within the said space of sixty years; and that all and every person or persons, bodies politic and corporate, their heirs and successors, and all claiming by, from, or under them or any of them, for and according to their and every of their several estates and interests which they have or claim to have or shall or may have or claim to have in the same respectively, shall at all times hereafter quietly and freely have, hold, and enjoy, against his Majesty, his heirs and successors, claiming by any title which hath not first accrued or grown or which shall not hereafter first accrue or grow within the said space of sixty years, all and singular manors, lands, tenements, rents, tythes, and hereditaments whatsoever (except liberties and franchises) which he or they, or his or their or any of their ancestors or predecessors, or those from, by, or under whom they do or shall claim, have or shall have held or enjoyed, or taken the rents, revenues, issues, or profits thereof, by the space of sixty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or

times hereafter be filed, issued, or commenced for recovering the same, or in respect thereof, unless his Majesty, or some of his progenitors, predecessors, or ancestors, heirs or successors, or some other person or persons, bodies politic or corporate, by, from, or under whom his Majesty, his heirs or successors, any thing hath or lawfully claimeth, or shall have or lawfully claim in the said manors, lands, tenements, rents, tythes, or hereditaments, by force of any right or title, have been or shall have been answered by virtue of any such right or title, the rents, revenues, issues, or other profits thereof within the said space of sixty years, or that the same have or shall have been duly in charge or stood insuper of record as aforesaid within the said space of sixty years; and furthermore, that all and every person and persons, bodies politic and corporate, their heirs and successors, and all claiming or to claim by, from, or under them or any of them, for and according to their and every of their several estates and interests which they have or claim or shall or may have or claim respectively, shall for ever hereafter quietly and freely have, hold, and enjoy all such manors, lands, tenements, rents, tythes, and hereditaments (except liberties and franchises) as they now have, claim, or enjoy, or hereafter shall or may have, claim, or enjoy, whereof his Majesty, his progenitors, predecessors, or ancestors, or whereof his Majesty, his heirs or successors, or he or they by, from, or under whom his Majesty, his heirs or successors, any thing hath or lawfully claimeth or shall have or lawfully claim, or some of them, by force of some right or title to the same, have not or shall not have been answered, by virtue of such right or title, the rents, revenues, issues, or profits thereof within the space of sixty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced for recovering the same, or in respect thereof, nor the same have been nor shall have been duly in charge, or stood insuper of record as aforesaid, within the said space of sixty years, against all and every person and persons, their heirs and assigns, having, claiming, or pretending to have, or who shall or may have, claim, or pretend to have, any estate, right, title, interest, claim, or demand whatsoever of, in, or to the same by force

as against
all persons
claiming
any estate

or interest therein by colour of any letters patent or grants upon suggestion of concealment, wrongful detaining, &c., for which judgement hath not or shall not be given for the Crown within sixty years before the commencing such suit.

or colour of any letters patents, or grants upon suggestion of concealment or wrongful detaining, or not being in charge, or defective titles, or by, from, or under any patentees or grantees, or any letters patents or grants upon suggestion of concealment or wrongful detaining, or not being in charge, or defective titles, of or for which said manors, lands, tenements, rents, tythes, and hereditaments, or any of them, no verdict, judgement, decree, judicial order upon hearing, or sentence of any court now standing in force hath been had or given, or any such verdict, judgement, decree, judicial order upon hearing, or sentence of court shall hereafter be had or given, in any action, bill, plaint, or information in any of his Majesty's courts at Westminster, for or in the name of the King's Majesty, or any of his ancestors, progenitors, predecessors, heirs, or successors, or for any of the said patentees or grantees, or for their or any of their heirs or assigns, within the space of sixty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced for recovering the same, or in respect thereof as aforesaid.

In what cases the rents and profits of manors, &c. shall be deemed to be duly in charge.

2. Provided always, . . . that where the rents, revenues, issues, or profits of any manors, lands, tenements, tythes, or hereditaments are or shall be in charge by, to, or with any auditor or auditors or other proper officer or officers of the revenue, such rents, revenues, issues, and profits shall be held, deemed, and taken to be duly in charge within the meaning and intent of this Act, any usage or custom to the contrary notwithstanding.

Cases wherein reversions or remainders in the Crown of any manors, &c., are not liable to be impeached by this Act.

3. Provided always, that this Act or any thing therein contained shall not extend to bar, impeach, or hinder his Majesty, his heirs or successors, of, for, or from any manors, tenements, rents, tythes, or hereditaments whereof any reversion or remainder now is in his Majesty, for or concerning the said reversion or remainder, nor of, for, or from any reversion or remainder, or possibility of reversion or remainder, in any of his Majesty's progenitors or predecessors or ancestors, which by the expiration, end, or other determination of any limited estate of fee-simple, or of any fee-tail or other particular estate, hath or ought to have first fallen or

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become in possession, or which shall or may or ought hereafter first to fall or come in possession, within the space of sixty years next before the filing, issuing, or commencing of any such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced for recovering the same, or in respect thereof; nor of, for, or from any right or title first accrued or grown to his Majesty, or any of his progenitors, predecessors, or ancestors, or which shall first accrue or grow to his Majesty, or any of his heirs or successors, of, in, or to any manors, lands, tenements, rents, tythes, or hereditaments at any time or times within the space of sixty years next before the filing, issuing, or commencing of any such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced for recovering the same, or in respect thereof, and not before.

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4. Provided also, . . . that this Act or anything therein contained shall not extend to any manors, lands, tenements, rents, tythes, or hereditaments mentioned to be granted or conveyed by any of his Majesty's progenitors, predecessors, or ancestors, or by any other under whom his Majesty claimeth, to any person or persons, of any limited estate in fee-simple, or of any estate in tail or other particular estate, which several estates (if the same had been good and effectual in law) have or ought to have first fallen or become in possession or will or ought first to fall or come in possession within the space of sixty years next before the filing, issuing, or commencing of any such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced for recovering the same, or in respect thereof as aforesaid; nor to any manors, lands, tenements, rents, tythes, or hereditaments mentioned to be granted or conveyed by any of his Majesty's progenitors, predecessors, or ancestors, or by any other under whom his Majesty claimeth, to any person or persons, in fee-tail or other particular estate, whereof the reversion or inheritance (if such estate tail or other particular estate had been good and effectual in law) should have been and continued in his Majesty, or any of his progenitors, predecessors, or ancestors, or should or ought hereafter to be and continue in

Limitation
of the Act
with re-
spect to
grants
from the
Crown of
any limited
estate, &c.

his Majesty, his heirs or successors, at any time within the space of sixty years next before the filing, issuing, or commencing of any such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced for recovering the same, or in respect thereof as aforesaid.

The said manors, &c., to be holden of the Crown upon the usual tenures, services, and duties.

5. Provided also, . . . that all and singular the said manors, lands, tenements, and hereditaments shall at all times hereafter be holden of his Majesty, his heirs and successors, and of other person and persons, bodies politic and corporate, their heirs and successors respectively, by the same tenures, services, fee-farms, chief rents, heriots, and other duties, to all intents and purposes, as the same should or ought of right to have been holden if the estates, rights, and interests established and made sure by this present Act had been before the making of this Act firm, good, and effectual in law.

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General reservation of rights.

6. Saving to every person and persons, bodies politic and corporate, their heirs and successors (other than his most excellent Majesty, his heirs and successors, and other than all patentees or grantees of concealments or defective titles, and all and every person or persons claiming from, by, or under them or any of them for or in respect or by reason of any such patents or grants of concealments or defective titles,) all such rights, title, interest, estate, rents, commons, customs, duties, profits, and other claims and demands whatsoever in, to, or out of the said manors, lands, tenements, tythes, or hereditaments as they or any of them had or ought to have had before the making of this Act, any thing in this Act to the contrary notwithstanding.

Provision for securing to the Crown such fee farm or other rents, &c., as have been paid within a limited time.

7. Provided also, . . . that where any fee-farm rent or other rent or rents have been or shall be answered and actually paid to the King's Majesty, or to any his predecessors, heirs or successors, within the space of sixty years next before any action, bill, plaint, information, commission, or other suit or proceeding shall at any time or times, hereafter be filed, issued, or commenced for recovering the same, or in respect thereof out of any manors, lands, tenements, or hereditaments of which manors, lands, tenements, or hereditaments the estates, rights, or interests, being defective, are established and made sure by this present Act, and the

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King's Majesty, his heirs and successors, shall from henceforth for ever have, hold, and enjoy the said rents and arrears thereof in such manner and form and as fully and amply as the same are or were enjoyed at any time within the said space of sixty years.

8. Provided always, . . . that nothing in this Act contained shall extend or be prejudicial to the right, title, or claim of any person or persons in or to any manors, lands, tenements, or hereditaments by virtue of or under any grant or grants, letters patent or letters patents, from any of his Majesty's progenitors, ancestors, or predecessors, or by virtue of or under any grant or grants, letters patent or letters patents, from his Majesty, made or passed before the first day of January one thousand seven hundred and sixty-nine, so as such right, title, or claim be prosecuted with effect by bill, plaint, information, or other suit or proceeding in some of his Majesty's courts of record at Westminster within the space of one year from the first day of January one thousand seven hundred and sixty-nine.

Right under any grant from the Crown of any manors, &c., made before 1st Jan., 1769, not prejudiced by this Act, if prosecuted within a year.

9. Provided always, . . . that nothing in this Act contained shall extend or be prejudicial to any right, title, or claim which his Majesty now hath to any lands, tenements, or hereditaments within the manor of East Greenwich, in the county of Kent, or to any messuages, lands, tenements, or hereditaments within the precinct, district, or liberty commonly called the Savoy, in the county of Middlesex, or to any the manors, messuages, advowsons, buildings, lands, tenements, hereditaments, and appurtenances being the estate and possession of the late hospital of Savoy, or of the master and chaplains of the said hospital, so as such right, title, or claim be prosecuted with effect by bill, plaint, information, or other suit or proceeding in some of his Majesty's courts of record at Westminster within the space of two years from the first day of January one thousand seven hundred and sixty-nine.

Right of the Crown to any lands, &c., within the manor of East Greenwich or district of the Savoy not prejudiced, if prosecuted within two years.

10. Provided always, . . . that no putting in charge, nor standing insuper, nor taking or answering the farm rents, revenues, or profits of any of the said manors, lands, tenements, or hereditaments by force, colour, or pretext of any letters patent or grants of concealments or defective titles, or of manors, lands, tenements, or hereditaments out of charge,

Provision declaring what shall or shall not be deemed a putting in charge, standing

insuper, or
taking or
answering
by or to
the Crown,
&c.

or by force, colour, or pretext of any inquisitions, presentments by or by reason of any commission or other authority to find out concealments, defective titles, or lands, tenements, or hereditaments out of charge, shall be deemed, construed, or taken to be a putting in charge, standing insuper, or taking or answering the farm rents, revenues, or profits by or to his Majesty, or any of his progenitors or predecessors, heirs, or successors, unless thereupon such manors, lands, tenements, or hereditaments have been or shall be, upon some information or suit on the behalf of his Majesty or some of his progenitors or predecessors, heirs or successors, upon a lawful verdict given or to be given, or demurrer in law adjudged, or upon a hearing ordered or decreed for his Majesty or some of his progenitors or predecessors, heirs or successors, or of some of them, within the space of sixty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced for recovering the same or in respect thereof as aforesaid.

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48 GEO. III. C. 47 (CROWN CLAIMS LIMITATION (IRELAND)
ACT, 1808).

An Act for quieting possessions and confirming defective titles in Ireland, and limiting the right of the Crown to sue in manner therein mentioned; and for the relief of incumbents in respect of arrears due to the Crown, during the incumbency of their predecessors. [27th May 1808.]

WHEREAS by an Act, passed in the ninth year of his present Majesty's reign, intituled, *An Act to amend and render more effectual an Act made in the twenty-first year of the reign of King James the First, intituled, "An Act for the general quiet of the subjects against all pretences of concealment whatsoever,"* it was enacted, that the King's Majesty, his heirs, and successors, should not implead for any manors, lands, or hereditaments whereon the right to such lands, manors or hereditaments did not or should not have accrued within sixty years next before the commencement of any suits instituted in respect of the same: and whereas it is expedient to limit in like manner the right and title of his Majesty, his heirs and successors, in and to all manors, lands, tenements, rents, tythes and hereditaments (except liberties and franchises) in *Ireland* to sixty years next before the commencement of any suit or proceeding for the same, and to secure to all his Majesty's subjects the free and quiet enjoyment of all manors, lands, tenements, rents, tythes, and hereditaments which they or those under whom they claim respectively have held or enjoyed, or whereof they have taken the rents, revenues, issues or profits for the space of sixty years next before the commencement of any suit or proceeding for the same; wherefore be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the King's Majesty,

9 Geo. 3.
His Majesty shall not

sue for any estate when the right hath not nor shall first accrue within sixty years before the commencement of such suit.

his heirs or successors, shall not at any time hereafter sue, impeach, question or implead any person or persons, bodies politick or corporate in *Ireland*, for or in anywise concerning any manors, lands, tenements, rents, tythes or hereditaments whatsoever (other than liberties or franchises) or for or in anywise concerning the revenues, issues, or profits thereof, or make any title, claim, challenge or demand of, in, or to the same or any of them, by reason of any right or title which hath not first accrued or grown or which shall not hereafter first accrue or grow within the space of sixty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission or other suit or proceeding, as shall at any time or times hereafter be filed, issued, or commenced for recovering the same or in respect thereof, unless his Majesty, or some of his progenitors, predecessors, heirs or successors, or some other person or persons, bodies politick or corporate, under whom his Majesty, his heirs or successors, any thing hath or lawfully claimeth, or shall have or lawfully claim, have or shall have been in the actual seisin thereof, or have or shall have been answered by force and virtue of any right or title to the same, the rents, revenues, issues or profits thereof, or the rents, issues or profits of any honors, manors or other hereditaments, whereof the premises in question shall be part or parcel, within the said space of sixty years, or that the same have or shall have been duly in charge to his Majesty, or some of his progenitors, predecessors or ancestors, heirs or successors, within the said space of sixty years; and that all and every person or persons, bodies politick and corporate, their heirs and assigns, and all claiming by, from, or under them or any of them, for and according to their and every of their several estates and interests which they have or claim to have, or shall or may have or claim to have in the same respectively, shall at all times hereafter quietly and freely have, hold and enjoy, against his Majesty, his heirs and successors, claiming by any title which hath not first accrued or grown or which shall not hereafter first accrue or grow within the said space of sixty years, all and singular manors, lands, tenements, rents, tythes and hereditaments whatsoever, (except liberties and franchises) which he or they, or his or their or any of their ancestors or predecessors, or those from, by or under whom

they do or shall claim, or shall have held or enjoyed or taken the rents, revenues, issues or profits thereof by the space of sixty years next before the filing, issuing or commencing of every such action, bill, plaint, information, commission or other suit or proceeding, as shall at any time or times hereafter be filed, issued or commenced for recovering the same, or in respect thereof, unless his Majesty, or some of his progenitors, predecessors or ancestors, heirs or successors, or some other person or persons, bodies politick or corporate, by, from, or under whom his Majesty, his heirs, or successors, anything hath or lawfully claimeth, or shall have or lawfully claim in the said manors, lands, tenements, rents, tythes or hereditaments, by force of any right or title have or shall have been in the actual seisin thereof, or have been or shall have been answered by virtue of any such right or title, the rents, revenues, issues, or other profits thereof, within the said space of sixty years, or that the same have or shall have been duly in charge as aforesaid within the said space of sixty years.

2. Provided always, and be it enacted, that where the rents, revenues, issues or profits of any manors, lands, tenements, tythes or hereditaments are or shall be in charge, by, to, or with any auditor or auditors, or proper officer or officers of the revenue, such rents, revenues, issues and profits shall be held, deemed and taken to be duly in charge within the intent and meaning of this Act; any usage or custom to the contrary notwithstanding.

In what cases the rents and profits of estate shall be deemed in charge.

3. Provided always, that this Act or anything herein contained shall not extend to bar, impeach or hinder his Majesty, his heirs or successors, of, for, or from any manors, tenements, rents, tythes or hereditaments, whereof any reversion or remainder now is in his Majesty for or concerning the said reversion or remainder; nor of, for, or from any reversion or remainder, or possibility of reversion or remainder in any of his Majesty's progenitors, predecessors, or ancestors, which by the expiration, end, or other determination of any limited estate of fee simple, or of any fee tail or other particular estate, hath or ought to have first fallen or become in possession, or which shall or may or ought hereafter first to fall or come in possession within the space of sixty years next before the filing, issuing or

Cases wherein reversions or remainders in the Crown of any lands are not liable to be impeached by this Act.

commencing of any such action, bill, plaint, information, commission, or other suit or proceeding, or shall at any time or times hereafter be filed, issued, or commenced for recovering the same or in respect thereof; nor of, for, or from any right or title first accrued or grown to his Majesty, or any of his progenitors, predecessors or ancestors, or which shall first accrue or grow to his Majesty, or any of his heirs, or successors, of, in, or to any manors, lands, tenements, rents, tythes or hereditaments, at any time or times within the space of sixty years next before the filing, issuing, or commencing, of any such action, bill, plaint, information, commission, or other suit or proceeding, as shall at any time or times hereafter be filed, issued or commenced for recovering the same or in respect thereof, and not before.

Lands to be holden of the Crown upon the usual tenures, services, and duties.

4. Provided also, and be it enacted, that all and singular the said manors, lands, tenements, tythes and hereditaments, shall at all times hereafter be holden of his Majesty, his heirs and successors, and of other person or persons, bodies politic and corporate, their heirs and successors respectively, by the same tenures, services, fee farms, chief rents, quit rents, heriots, and other duties, to all intents and purposes as the same should or ought of right to have been holden if the estates, rights and interests established and made sure by this present Act had been before the making of this Act firm and effectual in law: saving to every person and persons, bodies politick and corporate, their heirs and successors (other than his most excellent Majesty, his heirs and successors) all such rights, title, interest, estate, rents, commons, customs, duties, profits, and other claims and demands whatsoever, into or out of the said manors, lands, tenements, tythes or hereditaments, as they or any of them had or ought to have had before the passing of this Act; anything in this Act to the contrary notwithstanding.

When rents shall be paid to the king within sixty years, they shall remain payable.

5. Provided also, and be it enacted, that where any fee farm rent or other rent or rents have been or shall be answered and actually paid to the King's Majesty, or to any of his predecessors, heirs or successors, within the space of sixty years next before any action, bill, plaint, information, commission, or other suit or proceeding shall at any time or times hereafter be filed, issued or commenced for recovering the same, or in respect hereof, out of any manors, lands,

tenements, tythes or hereditaments, of which manors, lands, tenements, tythes or hereditaments, the estates, rights or interests being defective, are established and made sure by this present Act, that his Majesty, his heirs and successors, shall from henceforth for ever have, hold, and enjoy the said rents and arrearsages thereof in such manner and form and as fully and as amply as the same are or were enjoyed at any time within the said space of sixty years.

6. And be it further enacted, that in all cases where any rents or other dues in the nature or lieu of rents now are or shall hereafter become due and payable to his Majesty, his heirs and successors, out of or chargeable upon any rectories, vicarages, curacies or other ecclesiastical benefices, or payable by the rectors, vicars, curates or other ecclesiastical persons, the incumbents thereof respectively having respectively actual cure of souls, such rectors, vicars, curates, or other ecclesiastical persons, or any of them, shall not be subject or liable to, or compellable to pay or satisfy to his Majesty, his heirs or successors, any arrear or arrears of such rent or rents or other dues which shall have accrued or shall hereafter accrue due and payable before the accruing of the title of such rector, vicar, curate or other ecclesiastical person to such rectories, vicarages, curacies or other ecclesiastical benefices aforesaid; and that no distress, action, suit or other proceeding whatsoever shall be made, brought, commenced or prosecuted against any such rector, vicar, curate, or other ecclesiastical person during his life, or against his lands, tenements, goods or chattels after his death, for any such arrear or any part thereof.

Certain estates to be holden on usual tenures.

9 GEO. IV. C. 14 (LORD TENTERDEN'S ACT).

An Act for rendering a written memorandum necessary to the validity of certain promises and engagements.

[9th May 1828.]

English
Act, 21
Jac. 1, c.
16.

Irish Act,
10 Car. 1,
Sess. 2, c. 9.

In actions
of debt or
upon the
case, no
acknow-
ledgment
shall be
deemed
sufficient,

WHEREAS by an Act passed in *England* in the twenty-first year of the reign of King *James* the First, it was, among other things, enacted, that all actions of account and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty, and all actions of debt for arrearages of rent, should be commenced within three years after the end of the then present session of parliament, or within six years next after the cause of such actions or suit, and not after: and whereas a similar enactment is contained in an Act passed in *Ireland* in the tenth year of the reign of King *Charles* the First: and whereas various questions have arisen in actions founded on simple contract, as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the said enactments; and it is expedient to prevent such questions, and to make provision for giving effect to the said enactments and to the intention thereof: be it therefore enacted by the King's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, that in actions of debt or upon the case grounded upon any simple contract no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by

or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of the said enactments or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever: provided also, that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited Acts or this Act, as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff.

unless it be in writing, or by part payment.
Joint contractors.

Proviso for the case of joint contractors.

p. 555. 2. And be it further enacted, that if any defendant or defendants in any action on any simple contract shall plead any matter in abatement, to the effect that any other person or persons ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial that the action could not, by reason of the said recited Acts or this Act, or of either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same (1).

Pleas in abatement

p. 121. 3. And be it further enacted, that no indorsement or memorandum of any payment written or made after the time appointed for this Act to take effect, upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment shall be made shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes.

Indorsements of payment.

(1) Repealed. See 42 & 43 Vict. c. 59, Schedule, Part II.; 46 & 47 Vict. c. 49.

Simple contract debts alleged by way of set-off.

Memorandums exempted from stamps.

Not to extend to Scotland.

4. And be it further enacted, that the said recited Acts and this Act shall be deemed and taken to apply to the case of any debt on simple contract alleged by way of set-off on the part of any defendant, either by plea, notice or otherwise.

8. And be it further enacted, that no memorandum or other writing made necessary by this Act shall be deemed to be an agreement within the meaning of any statute relating to the duties of stamps.

9. And be it further enacted, that nothing in this Act contained shall extend to *Scotland*.

3 & 4 WM. IV. C. 27 (THE REAL PROPERTY LIMITATION ACT, 1833).

An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto. [24th July, 1833.]

(*As amended by the Real Property Limitation Act, 1874, 37 & 38 Vict. c. 57, and other Acts*) (1).

BE it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that the words and expressions herein-after mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; (that is say,) the word "land" shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole), and also to any share, estate, or interest in them or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure; and the word "rent" shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole); and the person through whom another person is said to claim shall mean any person by, through, or under, or by the act of whom the person so

Meaning of the words in the Act.

"Land."

"Rent."

Person through whom another claims.

(1) The changes introduced by the Real Property Limitation Act, 1874, are in italics. For the Act in its original form, see *post*, p. 642. For the Real Property Limitation Act, 1874, see p. 684.

	claiming became entitled to the estate or interest claimed, as heir, issue in tail, tenant by the curtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat; and the word "person" shall extend to a body politic, corporate, or collegiate, and to a class of creditors or other persons as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.	p. 330.
"Person."		p. 331.
Number and gender.		
No land or rent to be recovered but within 12 years after the right of action accrued.	2. (37 & 38 Vict. c. 57, s. 1.) <i>After the commencement of this Act (i.e. 1st January, 1879) no person shall make an entry or distress or bring an action or suit to recover any land or rent but within twelve years next after the time at which the right to make such entry or distress or to bring such action or suit shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress or to bring such action or suit shall have first accrued to the person making or bringing the same.</i>	p. 276.
When the right shall be deemed to have accrued :	3. In the construction of this Act the right to make an entry or distress or bring an action to recover any land or rent shall be deemed to have first accrued at such time as herein-after is mentioned ; (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received : and when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or	p. 276.
In the case of an estate in possession ;		
on dispossession ;		
on abatement or death ;		p. 305.

- p. 305. interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; and when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument; and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession; and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken.
- p. 314. on alienation;
- p. 335. in case of future estate;
- p. 335. in case of forfeiture or breach of condition.

- p. 335. 4. Provided always, that when any right to make an entry or distress or to bring an action to recover any land or rent, by reason of any forfeiture or breach of condition, shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened.
- p. 335. Where advantage of forfeiture is not taken by remainderman, he shall have a new right when his estate comes into possession.

- p. 314. 5. (37 & 38 Vict. c. 57, s. 2.) *A right to make an entry or distress or to bring an action or suit to recover any land or rent*
- Provision for case of future estates.

Time limited to six years when person entitled to the particular estate out of possession, &c.

shall be deemed to have first accrued, in respect of an estate or interest in reversion or remainder or other future estate or interest, at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land or rent or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined have been in possession or receipt of the profits of such land, or in receipt of such rent. But if the person last entitled to any particular estate on which any future estate or interest was expectant shall not have been in the possession or receipt of the profits of such land, or in receipt of such rent, at the time when his interest determined, no such entry or distress shall be made, and no such action or suit shall be brought by any person becoming entitled in possession to a future estate or interest, but within twelve years next after the time when the right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the person whose interest shall have so determined, or within six years next after the time when the estate of the person becoming entitled in possession shall have become vested in possession whichever of those two periods shall be the longer ; and if the right of any such person to make such entry or distress, or to bring any such action or suit shall have been barred under this Act, no person afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will, or settlement, executed or taking effect after the time when a right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the owner of the particular estate whose interest shall have so determined as aforesaid, shall make any such entry or distress, or bring any such action or suit to recover such land or rent.

p. 323.

p. 325.

An administrator to claim as if he obtained the estate without interval after death of deceased.

6. For the purposes of this Act an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration.

p. 339.

7. When any person shall be in possession or in receipt of

- p. 341. the profits of any land or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued, either at the determination of such tenancy or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: provided always, that no mortgagor or cestui que trust shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee.
- p. 358. 8. When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or to bring an action to recover such land or rent shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen).
- p. 366. 9. When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent subject to such lease or of the person through whom he claims to make an entry or distress or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled.
- p. 372. 10. No person shall be deemed to have been in possession of
- In the case of a tenant at will the right shall be deemed to have accrued at the end of one year.
- No person after a tenancy from year to year to have any right but from the end of the first year or last payment of rent.
- Where rent amounting to 20s., reserved by a lease in writing, shall have been wrongfully received, no right to accrue on the determination of the lease.
- A mere en-

try not to
be deemed
possession.

No right
to be pre-
served by
continual
claim.

Possession
of one co-
parcener,
&c., not to
be the
possession
of the
others.

Possession
of a
younger
brother not
to be the
possession
of the heir.

Acknow-
ledgment
in writing
given to
the person
entitled, or
his agent,
to be
equivalent
to posses-
sion or re-
ceipt of
rent.

Where pos-
session is
not adverse
at the time

any land within the meaning of this Act merely by reason of having made an entry thereon.

11. No continual or other claim upon or near any land shall preserve any right of making an entry or distress or of bringing an action.

12. When any one or more of several persons entitled to any land or rent as coparceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them.

13. When a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir.

14. Provided always, that when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing, signed by the person in possession or in receipt of the profits of such land or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given.

15. Provided also, that when no such acknowledgment as aforesaid shall have been given before the passing of this Act, and the possession or receipt of the profits of the land,

p. 372.

p. 375.

p. 375.

p. 380.

p. 388. or the receipt of the rent, shall not at the time of the passing of this Act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years herein-before limited shall have expired, make an entry or distress, or bring an action to recover such land or interest, at any time within five years next after the passing of this Act.

of passing the Act, the right shall not be barred until the end of five years afterwards.

p. 390. 16. (37 & 38 Vict. c. 57, s. 3.) *If at the time at which the right of any person to make an entry or distress, or to bring an action or suit to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities herein-after mentioned, (that is to say,) infancy, coverture, idiotcy, lunacy, or unsoundness of mind, then such person, or the person claiming through him, may, notwithstanding the period of twelve years or six years (as the case may be) herein-before limited shall have expired, make an entry or distress, or bring an action or suit to recover such land or rent, at any time within six years next after the time at which the person to whom such right shall first have accrued shall have ceased to be under any such disability, or shall have died (whichever of those two events shall have first happened).*

In cases of infancy, coverture, or lunacy at the time when the right of action accrues, then six years to be allowed from the termination of the disability or previous death.

p. 391. (37 & 38 Vict. c. 57, s. 4.) *The time within which any such entry may be made, or any such action or suit may be brought as aforesaid, shall not in any case after the commencement of this Act (i.e. of 37 & 38 Vict. c. 57, viz. 1st Jan. 1879) be extended or enlarged by reason of the absence beyond seas during all or any part of that time of the person having the right to make such entry or to bring such action or suit or of any person through whom he claims.*

No time to be allowed for absence beyond seas.

p. 391. 17. (37 & 38 Vict. c. 57, s. 5.) *No entry, distress, action or suit shall be made or brought by any person who, at the time at which his right to make any entry or distress, or to bring an action or suit to recover any land or rent, shall have first accrued, shall be under any of the disabilities herein-before mentioned, or by any person claiming through him, but within thirty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such thirty years, or although the term of six years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired.*

Thirty years utmost allowance for disabilities.

No further time to be allowed for a succession of disabilities.

18. Provided always, that when any person shall be under any of the disabilities herein-before mentioned at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent, shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent, beyond the said period of *twelve* years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent, shall have first accrued, or the said period of *six* years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person.

p. 391.

Scotland, Ireland, and the adjacent islands not to be deemed beyond seas.

19. No part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any island adjacent to any of them (being part of the dominions of His Majesty), shall be deemed to be beyond seas within the meaning of this Act.

When the right to an estate in possession is barred, the right of the same person to future estates shall also be barred.

20. When the right of any person to make an entry or distress or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession shall have been barred by the determination of the period herein-before limited, which shall be applicable in such case, and such person shall at any time during the said period have been entitled to any other estate, interest, right, or possibility, in reversion, remainder, or otherwise, in or to the same land or rent, no entry, distress, or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right, or possibility, unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest, or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession.

p. 316.

Where tenant in tail is barred, remaindermen, whom he might have barred shall not recover.

21. When the right of a tenant in tail of any land or rent to make an entry or distress or to bring an action to recover the same shall have been barred by reason of the same not having been made or brought within the period herein-before limited, which shall be applicable in such case, no such entry, distress, or action shall be made or brought

p. 402.

by any person claiming any estate, interest, or right which such tenant in tail might lawfully have barred.

p. 408. 22. When a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period herein-before limited, which shall be applicable in such case, for making an entry or distress or bringing an action to recover such land or rent, no person claiming any estate, interest, or right which such tenant in tail might lawfully have barred shall make an entry or distress or bring an action to recover such land or rent but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action.

Possession adverse to a tenant in tail shall run on against the remaindermen whom he might have barred.

p. 403. 23. (37 & 38 Vict.] c. 57, s. 6.) *When a tenant in tail of any land or rent shall have made an assurance thereof, which shall not operate to bar the estate or estates to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person or any other person whatsoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail), shall continue or be in such possession or receipt for the period of twelve years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then at the expiration of such period of twelve years such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail.*

In case of possession under an assurance by a tenant in tail, which shall not bar the remainders, they shall be barred at the end of twelve years after that period, at which the assurance, if then executed, would have barred them.

p. 413. 24. No person claiming any land or rent in equity shall bring any suit to recover the same but within the period during which, by virtue of the provisions herein-before contained, he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest, or right in or to the same as he shall claim therein in equity.

No suit in equity to be brought after the time when the plaintiff, if entitled at law, might have brought an action.

25. Provided always, that when any land or rent shall

In cases of express trust, the right shall not be deemed to have accrued until a conveyance to a purchaser.

Time for recovering charges and arrears of interest not to be enlarged by express trusts for raising the time.

In cases of fraud no time shall run whilst the fraud remains concealed.

Saving the jurisdiction of equity on the ground of acquiescence or otherwise.

Mortgagor to be barred at the end of twelve

be vested in a trustee upon any express trust, the right of the cestui que trust, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this Act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him.

(Sect. 10 of 37 & 38 Vict. c. 57.) *After the commencement of this Act (i.e. 1st Jan. 1879), no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust or to recover any arrears of rent or of interest, except within the time within which the same would be recoverable if there were not any such trust.*

26. In every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall or with reasonable diligence might have been first known or discovered; provided that nothing in this clause contained shall enable any holder of lands or rents, to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud against any bonâ fide purchaser for valuable consideration who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe that any such fraud had been committed.

27. Provided always, that nothing in this Act contained shall be deemed to interfere with any rule or jurisdiction of courts of equity in refusing relief on the ground of acquiescence or otherwise to any person whose right to bring a suit may not be barred by virtue of this Act.

28. (37 & 38 Vict. c. 57, s. 7.) *When a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage but within*

p. 427.

p. 428.

p. 449.

p. 452.

p. 462.

twelve years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor or of his right to redemption shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, in writing signed by the mortgagee or the person claiming through him; and in such case no such suit shall be brought but within twelve years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgaged money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment with interest of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.

years from the time when the mortgagee took possession, or from the last written acknowledgment.

p. 468.

29. Provided always, that it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual or eleemosynary corporation sole, to make an entry or distress or to bring an action or suit to recover any land or rent within such period as herein-

No lands or rents to be recovered by ecclesiastical or eleemosynary

corpora-
tion sole
but within
two incum-
bencies and
six years,
or sixty
years.

53 & 54
Vict. c. 51.

No advow-
son to be
recovered
but within
three in-
cumbencies
or sixty
years.

Incumben-
cies after
lapse to be
reckoned
within the
period, but
not incum-
bencies
after pro-
motions to
bishop-
ricks.

after is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress or bring such action or suit shall first have accrued; (that is to say,) the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies and such term of six years taken together shall amount to the full period of sixty years; and if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will with the time of the holding of such two persons and such six years make up the full period of sixty years; and no such entry, distress, action, or suit shall be made or brought at any time beyond the determination of such period.

30. No person shall bring any quare impedit or other action or any suit to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as herein-after is mentioned; (that is to say,) the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years; and if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as with the times of such incumbencies will make up the full period of sixty years.

31. Provided always, that when on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift of the patron thereof, a clerk shall be presented or collated thereto by His Majesty or the ordinary by reason of a lapse, such last-mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid; but when a clerk shall have been presented by His Majesty upon the avoidance of a benefice in consequence of the incumbent thereof having been made

p. 479.

p. 485.

p. 486.

a bishop, the incumbency of such clerk shall, for the purposes of this Act, be deemed a continuation of the incumbency of the clerk so made bishop.

p. 486. 32. In the construction of this Act every person claiming a right to present to or bestow any ecclesiastical benefice, as patron thereof, by virtue of any estate, interest, or right which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any quare impedit, action, or suit shall be limited accordingly.

When person claiming an advowson in remainder, &c., after an estate tail, shall be barred.

p. 486. 33. No person shall bring any quare impedit or other action or any suit to enforce a right to present to or bestow any ecclesiastical benefice, as the patron thereof, after the expiration of one hundred years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest, or undivided share or alternate right of presentation or gift, held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share, or right held or derived under the same title.

No advowson to be recovered after 100 years.

p. 492. 34. At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent, or advowson for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period shall be extinguished.

At the end of the period of limitation the right of the party out of possession to be extinguished.

p. 505. 35. The receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this Act.

Receipt of rent to be deemed receipt of profits.

36. Repealed by 42 & 43 Vict. c. 59.

37. Repealed by 37 & 38 Vict. c. 35.

38. Repealed by 37 & 38 Vict. c. 35.

No descent warranty, &c. to bar a right of entry.

Money charged upon land and legacies to be deemed satisfied at the end of twelve years if no interest paid or acknowledgment given in writing in the meantime.

No arrears of dower to be recovered for more than six years.

No arrears of rent or interest to be recovered for more than six years.

39. No descent cast, discontinuance, or warranty which may happen or be made shall toll or defeat any right of entry or action for the recovery of land.

40. (37 & 38 Vict. c. 57, s. 8.) *No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given.*

pp. 143
and 164.

41. No arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit.

p. 508.

42. No arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years.

p. 193.

p. 216.

p. 509. 43. No person claiming any tithes, legacy, or other property for the recovery of which he might bring an action or suit at law or in equity shall bring a suit or other proceeding in any spiritual Court to recover the same but within the period during which he might bring such action or suit at law or in equity. Act to extend to the spiritual Courts.

p. 487. 44. This Act shall not extend to Scotland. (The rest of the section is repealed by 37 & 38 Vict. c. 35.) Act not to extend to Scotland.

(Sect. 9 of 37 & 38 Vict. c. 57.) *From and after the commencement of this Act (i.e. 1st January, 1879) all the provisions of the Act passed in the session of the third and fourth years of the reign of his late Majesty King William the Fourth, chapter twenty-seven, except these contained in the several sections thereof next herein-after mentioned, shall remain in full force and shall be construed together with this Act and shall take effect as if the provisions herein-before contained were substituted in such Act for the provisions contained in the sections thereof numbered two, five, sixteen, seventeen, twenty-three, twenty-eight, and forty respectively (which several sections, from and after the commencement of this Act, shall be repealed) (1) and as if the term of six years had been mentioned instead of the term of ten years in the section of the said Act numbered eighteen, and the period of twelve years had been mentioned in the said section eighteen instead of the period of twenty years; and the provisions of the Act passed in the session of the seventh year of the reign of his late Majesty King William the Fourth, and the first year of the reign of her present Majesty, chapter twenty-eight, shall remain in full force and be construed together with this Act, as if the period of twelve years had been therein mentioned instead of the period of twenty years.* Act to be read with 3 & 4 Wm. IV. c. 27, of which certain parts are repealed, and other parts to be read in reference to alteration by the Act.

p. 167.

(1) The words within brackets are repealed by 46 & 47 Vict. c. 39.

3 & 4 WM. IV. C. 27 (THE REAL PROPERTY LIMITATION
ACT, 1833) (1).

*An Act for the Limitation of Actions and Suits relating to Real
Property, and for simplifying the Remedies for trying the
Rights thereto.*

[24th July 1833.]

Meaning of
the words
in the Act.

“Land.”

“Rent.”

Person
through
whom
another
claims.

BE it enacted by the king's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that the words and expressions herein-after mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; (that is to say,) the word “land” shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole), and also to any share, estate, or interest in them or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure; and the word “rent” shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole); and the person through whom another person is said to claim shall mean any person by, through, or under, or by the act of whom the person so claiming became entitled to the estate or interest claimed, as heir, issue in tail, tenant by the curtesy of *England*, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee,

p. 277.

p. 279.

p. 330.

(1) The Act is printed in its original form.

- p. 285. or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat; and the word "person" shall extend to a body politic, corporate, or collegiate, and to a class of creditors or other persons as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male. "Person."
Number and gender.
- p. 276. 2. And be it further enacted, that after the thirty-first day of *December* one thousand eight hundred and thirty-three no person shall make an entry or distress or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same. No land or rent to be recovered but within 20 years after the right of action accrued to the claimant or some person whose estate he claims.
- p. 284. 3. And be it further enacted, that in the construction of this Act the right to make an entry or distress or bring an action to recover any land or rent shall be deemed to have first accrued at such time as herein-after is mentioned; (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received; and when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such When the right shall be deemed to have accrued:
In the case of an estate in possession; on dispossession;
on abatement or death;
- p. 305.

Where rent amounting to 20s., reserved by a lease in writing, shall have been wrongfully received, no right to accrue on the determination of the lease.

be in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent subject to such lease, or of the person through whom he claims to make an entry or distress or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled.

p. 366.

A mere entry not to be deemed possession.

10. And be it further enacted, that no person shall be deemed to have been in possession of any land within the meaning of this Act merely by reason of having made an entry thereon.

p. 372.

No right to be preserved by continual claim.

11. And be it further enacted, that no continual or other claim upon or near any land shall preserve any right of making an entry or distress or of bringing an action.

p. 372.

Possession of one co-parcener, &c., not to be the possession of the others.

12. And be it further enacted, that when any one or more of several persons entitled to any land or rent as co-parceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them.

p. 375.

Possession of a younger brother not to be the possession of the heir.

13. And be it further enacted, that when a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be

p. 375.

the possession or receipt of or by the person intitled as heir.

p. 380. 14. Provided always, and be it further enacted that when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing, signed by the person in possession or in receipt of the profits of such land or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given.

Acknowledgment in writing given to the person entitled, or his agent, to be equivalent to possession or receipt of rent.

p. 388. 15. Provided also, and be it further enacted, that when no such acknowledgment as aforesaid shall have been given before the passing of this Act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this Act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years herein-before limited shall have expired, make an entry or distress, or bring an action to recover such land or interest, at any time within five years next after the passing of this Act.

Where possession is not adverse at the time of passing the Act, the right shall not be barred until the end of five years afterwards.

p. 390. 16. Provided always, and be it further enacted, that if at the time at which the right of any person to make an entry or distress, or bring an action to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities herein-after mentioned, (that is to say,) infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of twenty years herein-before limited shall have expired, make an entry or distress, or bring an action to recover such land or rent, at any time within ten years next after the time at which the person to whom such right shall

Persons under disability of infancy, lunacy, coverture, or beyond seas and their representatives, to be allowed ten years from the termination of their disability or death;

first have accrued as aforesaid shall have ceased to be under any such disability, or shall have died (which shall have first happened).

but no
action, &c.,
shall be
brought
beyond
forty years
after the
right of
action
accrued.

17. Provided nevertheless, and be it further enacted, that no entry, distress, or action shall be made or brought by any person who, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent, shall have first accrued, shall be under any of the disabilities herein-before mentioned, or by any person claiming through him, but within forty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired.

p. 391.

No further
time to be
allowed for
a succession
of dis-
abilities.

18. Provided always, and be it further enacted, that when any person shall be under any of the disabilities herein-before mentioned at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent, shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent, beyond the said period of twenty years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent, shall have first accrued, or the said period of ten years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person.

p. 391.

Scotland,
Ireland,
and the
adjacent
islands not
to be
deemed
beyond
seas.

19. And be it further enacted, that no part of the United Kingdom of *Great Britain* and *Ireland*, nor the Islands of *Man*, *Guernsey*, *Jersey*, *Alderney*, or *Sark*, nor any island adjacent to any of them (being part of the dominions of His Majesty), shall be deemed to be beyond seas within the meaning of this Act.

When the
right to an
estate in
possession
is barred,
the right

20. And be it further enacted, that when the right of any person to make an entry or distress or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession shall have been barred by the determination of the period herein-before limited,

p. 316.

which shall be applicable in such case, and such person shall at any time during the said period have been entitled to any other estate, interest, right, or possibility, in reversion, remainder, or otherwise, in or to the same land or rent, no entry, distress, or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right, or possibility, unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest, or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession.

of the same person to future estates shall also be barred.

p. 402.

21. And be it further enacted, that when the right of a tenant in tail of any land or rent to make an entry or distress or to bring an action to recover the same shall have been barred by reason of the same not having been made or brought within the period herein-before limited, which shall be applicable in such case, no such entry, distress, or action shall be made or brought by any person claiming any estate, interest, or right which such tenant in tail might lawfully have barred.

Where tenant in tail is barred, remaindermen, whom he might have barred, shall not recover.

p. 403.

22. And be it further enacted, that when a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period herein-before limited, which shall be applicable in such case, for making an entry or distress or bringing an action to recover such land or rent, no person claiming any estate, interest, or right which such tenant in tail might lawfully have barred shall make an entry or distress or bring an action to recover such land or rent but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action.

Possession adverse to a tenant in tail shall run on against the remaindermen whom he might have barred.

p. 403.

23. And be it further enacted, that when a tenant in tail of any land or rent shall have made an assurance thereof, which shall not operate to bar an estate or estates to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person or any other person whatsoever (other than some person entitled to such possession or receipt in respect of an

Where there shall have been possession under an assurance by a tenant in tail, which shall not bar the remaindermen, they shall

first have accrued as aforesaid shall have ceased to be under any such disability, or shall have died (which shall have first happened).

but no
action, &c.,
shall be
brought
beyond
forty years
after the
right of
action
accrued.

17. Provided nevertheless, and be it further enacted, that no entry, distress, or action shall be made or brought by any person who, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent, shall have first accrued, shall be under any of the disabilities herein-before mentioned, or by any person claiming through him, but within forty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired.

p. 391.

No further
time to be
allowed for
a succession
of dis-
abilities.

18. Provided always, and be it further enacted, that when any person shall be under any of the disabilities herein-before mentioned at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent, shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent, beyond the said period of twenty years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent, shall have first accrued, or the said period of ten years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person.

p. 391.

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19. And be it further enacted, that no part of the United Kingdom of *Great Britain and Ireland*, nor the Islands of *Man, Guernsey, Jersey, Alderney, or Sark*, nor any island adjacent to any of them (being part of the dominions of His Majesty), shall be deemed to be beyond seas within the meaning of this Act.

When the
right to an
estate in
possession
is barred,
the right

20. And be it further enacted, that when the right of any person to make an entry or distress or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession shall have been barred by the determination of the period herein-before limited,

p. 316.

which shall be applicable in such case, and such person shall at any time during the said period have been entitled to any other estate, interest, right, or possibility, in reversion, remainder, or otherwise, in or to the same land or rent, no entry, distress, or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right, or possibility, unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest, or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession.

of the same person to future estates shall also be barred.

p. 402.

21. And be it further enacted, that when the right of a tenant in tail of any land or rent to make an entry or distress or to bring an action to recover the same shall have been barred by reason of the same not having been made or brought within the period herein-before limited, which shall be applicable in such case, no such entry, distress, or action shall be made or brought by any person claiming any estate, interest, or right which such tenant in tail might lawfully have barred.

Where tenant in tail is barred, remaindermen, whom he might have barred, shall not recover.

p. 403.

22. And be it further enacted, that when a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period herein-before limited, which shall be applicable in such case, for making an entry or distress or bringing an action to recover such land or rent, no person claiming any estate, interest, or right which such tenant in tail might lawfully have barred shall make an entry or distress or bring an action to recover such land or rent but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action.

Possession adverse to a tenant in tail shall run on against the remaindermen whom he might have barred.

p. 403.

23. And be it further enacted, that when a tenant in tail of any land or rent shall have made an assurance thereof, which shall not operate to bar an estate or estates to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person or any other person whatsoever (other than some person entitled to such possession or receipt in respect of an

Where there shall have been possession under an assurance by a tenant in tail, which shall not bar the remainders, they shall

be barred at the end of twenty years after the time when the assurance, if then executed, would have barred them.

No suit in equity to be brought after the time when the plaintiff, if entitled at law, might have brought an action.

In cases of express trust, the right shall not be deemed to have accrued until a conveyance to a purchaser.

In cases of fraud no time shall run whilst the fraud remains concealed.

estate which shall have taken effect after or in defeasance of the estate tail), shall continue to be in such possession or receipt for the period of twenty years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then at the expiration of such period of twenty years such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail.

24. And be it further enacted, that after the said thirty-first day of *December* one thousand eight hundred and thirty-three no person claiming any land or rent in equity shall bring any suit to recover the same but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest, or right in or to the same as he shall claim therein in equity.

25. Provided always, and be it further enacted, that when any land or rent shall be vested in a trustee upon any express trust, the right of the cestui que trust, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this Act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him.

26. And be it further enacted, that in every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall or with reasonable diligence might have been first known or discovered; provided that nothing in this clause contained

p. 413.

p. 427.

p. 449.

shall enable any holder of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud against any *bona fide* purchaser for valuable consideration who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe that any such fraud had been committed.

p. 452. 27. Provided always, and be it further enacted, that nothing in this Act contained shall be deemed to interfere with any rule or jurisdiction of courts of equity in refusing relief on the ground of acquiescence or otherwise to any person whose right to bring a suit may not be barred by virtue of this Act.

Saving the jurisdiction of equity on the ground of acquiescence or otherwise.

p. 462. 28. And be it further enacted, that when a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent, comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor or of his right of redemption shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, in writing signed by the mortgagee or the person claiming through him; and in such case no such suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors, or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under him or them, and any

Mortgagor to be barred at the end of twenty years from the time when the mortgagee took possession, or from the last written acknowledgment.

person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein and not to any ascertained part of the mortgaged money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment with interest of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.

No lands or rents to be recovered by ecclesiastical or eleemosynary corporation sole but within two incumbencies and six years, or sixty years.

29. Provided always, and be it further enacted, that it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual or eleemosynary corporation sole, to make an entry or distress or to bring an action or suit to recover any land or rent within such period as hereinafter is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress or bring such action or suit shall first have accrued; (that is to say,) the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies and such term of six years taken together shall amount to the full period of sixty years; and if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will, with the time of the holding of such two persons and such six years make up the full period of sixty years; and after the said thirty-first day of December one thousand eight hundred and thirty-three no such entry, distress, action, or suit shall be made or brought at any time beyond the determination of such period.

p. 479.

p. 485. 30. And be it further enacted, that after the said thirty-first day of December one thousand eight hundred and thirty-three no person shall bring any quare impedit or other action or any suit to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as herein-after is mentioned; (that is to say,) the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years; and if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as with the times of such incumbencies will make up the full period of sixty years.

No advowson to be recovered but within three incumbencies or sixty years.

p. 486. 31. Provided always, and be it further enacted, that when on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift of the patron thereof, a clerk shall be presented or collated thereto by his Majesty or the ordinary by reason of a lapse, such last-mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid; but when a clerk shall have been presented by his Majesty upon the avoidance of a benefice in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk shall, for the purposes of this Act, be deemed a continuation of the incumbency of the clerk so made bishop.

Incumbencies after lapse to be reckoned within the period, but not incumbencies after promotions to bishopricks.

p. 486. 32. And be it further enacted, that in the construction of this Act every person claiming a right to present to or bestow any ecclesiastical benefice, as patron thereof, by virtue of any estate, interest, or right which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any quare impedit, action, or suit, shall be limited accordingly.

When person claiming an advowson in remainder, &c, after an estate tail, shall be barred.

33. Provided always, and be it further enacted, that after the said thirty-first day of December, one thousand eight hundred and thirty-three no person shall bring any quare impedit or other action or any suit to enforce a right

No advowson to be recovered after 100 years.

to present to or bestow any ecclesiastical benefice, as the patron thereof, after the expiration of one hundred years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest, or undivided share or alternate right of presentation or gift, held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share, or right held or derived under the same title.

p. 486.

At the end of the period of limitation the right of the party out of possession to be extinguished.

34. And be it further enacted, that at the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent, or advowson for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period shall be extinguished.

p. 492.

Receipt of rent to be deemed receipt of profits.

35. And be it further enacted, that the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this Act.

p. 505.

Real and mixed actions abolished after the 31st December, 1834;

36. And be it further enacted, that no writ of right patent, writ of right quia dominus remisit curiam, writ of right in capite, writ of right in London, writ of right close, writ of right de rationabili parte, writ of right of advowson, writ of right upon disclaimer, writ de rationabilibus divisis, writ of right of ward, writ de consuetudinibus et servitiis, writ of cessavit, writ of escheat, writ of quo jure, writ of secta ad molendinum, writ de essendo quietum de thelonio, writ of ne injuste vexes, writ of mesne, writ of quod permittat, writ of formedon in descender, in remainder, or in reverter, writ of assize of novel disseisin, nuisance, darrein-presentment, juris utrum, or mort d'ancestor, writ of entry sur disseisin, in the quibus, in the per, in the per and cui, or in the post, writ of entry sur intrusion, writ of entry sur

p. 411.

alienation dum fuit non compos mentis, dum fuit infra ætatem, dum fuit in prisiona, ad communem legem, in casu proviso, in consimili casu, cui in vita, sur cui in vita, cui ante divortium, or sur cui ante divortium, writ of entry sur abatement, writ of entry quare ejecit infra terminum, or ad terminum qui præteriit, or causa matrimonii prælocuti, writ of aiel, besaiel, tresaiel, cosinage, or nuper obiit, writ of waste, writ of partition, writ of disceit, writ of quod ei deforceat, writ of covenant real, writ of warrantia chartæ, writ of curia claudenda, or writ per quæ servitia, and no other action, real or mixed, (except a writ of right of dower or writ of dower unde nihil habet, or a quare impedit, or an ejectment,) and no plaint in the nature of any such writ or action, (except a plaint for freebench or dower), shall be brought after the thirty-first day of December one thousand eight hundred and thirty-four.

except for dower, quare impedit, and ejectment.

p. 412.

37. Provided always, and be it further enacted, that when, on the said thirty-first day of December one thousand eight hundred and thirty-four, any person who shall not have a right of entry to any land shall be entitled to maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought at any time before the first day of June one thousand eight hundred and thirty-five in case the same might have been brought if this Act had not been made notwithstanding the period of twenty years herein-before limited shall have expired.

Real actions may be brought until the 1st June, 1835.

p. 412.

38. Provided also, and be it further enacted, that when, on the said first day of June one thousand eight hundred and thirty-five, any person whose right of entry to any land shall have been taken away by any descent cast, discontinuance, or warranty, might maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought after the said first day of June one thousand eight hundred and thirty-five, but only within the period during which by virtue of the provisions of this Act an entry might have been made upon the same land by the person bringing such writ or action if his right of entry had not been so taken away.

Saving the rights of persons entitled to real actions only at the commencement of the Act, &c.

p. 412.

39. And be it further enacted, that no descent cast, discontinuance, or warranty which may happen or be made after the said thirty-first day of December one thousand

No descent warranty, &c., to bar a right of entry.

eight hundred and thirty-three shall toll or defeat any right of entry or action for the recovery of land.

Money charged upon land and legacies to be deemed satisfied at the end of twenty years if there shall be no interest paid or acknowledgment in writing in the meantime.

40. And be it further enacted, that after the said thirty-first day of December one thousand eight hundred and thirty-three no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one was given.

p. 164.

No arrears of dower to be recovered for more than six years.

41. And be it further enacted, that after the said thirty-first day of December one thousand eight hundred and thirty-three no arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit.

p. 508.

No arrears of rent or interest to be recovered for more than six years.

42. And be it further enacted, that after the said thirty-first day of December one thousand eight hundred and thirty-three no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person

p. 193.

p. 216.

entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years.

p. 509. 43. And be it further enacted, that after the said thirty-first day of December one thousand eight hundred and thirty-three no person claiming any tithes, legacy, or other property for the recovery of which he might bring an action or suit at law or in equity shall bring a suit or other proceeding in any spiritual court to recover the same but within the period during which he might bring such action or suit at law or in equity.

Act to extend to the spiritual courts.

p. 487. 44. Provided always, and be it further enacted, that this Act shall not extend to Scotland, and shall not, so far as it relates to any right to permit to or bestow any church, vicarage, or other ecclesiastical benefice, extend to Ireland.

Act not to extend to Scotland, nor to advowsons in Ireland.

45. And be it further enacted, that this Act may be amended, altered, or repealed during this present session of parliament.

Act may be amended.

3 & 4 WM. IV. C. 42, SS. 2—7 (1).

*An Act for the further Amendment of the Law and the
better Advancement of Justice (14th August, 1833).*

Executors
may bring
actions for
injuries to
the real
estates
of the
deceased ;

and actions
may be
brought
against
executors
for an
injury to
property
real or
personal by
their
testator.

Limitation
of actions
of debt for

2. And whereas there is no remedy provided by law for injuries to the real estate of any person deceased, committed in his life-time, nor for certain wrongs done by a person deceased in his life-time to another in respect of his property, real or personal ; for remedy thereof be it enacted, that an action of trespass or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased for any injury to the real estate of such person, committed in his life-time, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person ; and the damages, when recovered, shall be part of the personal estate of such person ; and further, that an action of trespass or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased for any wrong committed by him in his life-time to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person ; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person.

p. 135.

3. All actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other

(1) See 53 & 54 Vict. c. 51.

- specialty, and all actions of debt or *scire facias* upon any recognizance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any *fieri facias*, and all actions for penalties, damages, or sums of money given to the party grieved by any statute now or hereafter to be in force, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon an indenture of demise, or covenant or debt upon any bond or other specialty, actions of debt or *scire facias* upon recognizance, within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, within two years after the cause of such actions or suits, but not after; and the said other actions within six years after the cause of such actions or suits, but not after; provided that nothing herein contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited.
4. If any person or persons that is or are or shall be entitled to any such action or suit, or to such *scire facias*, is or are or shall be, at the time of any such cause of action accrued, within the age of twenty-one years, *feme covert*, *non compos mentis*, or beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they commence the same within such times after their coming to or being of full age, discover, of sound memory, or returned from beyond the seas, as other persons having no such impediment should, according to the provisions of this Act, have done; and if any person or persons against whom there shall be any such cause of action is or are, or shall be at the time such cause of action accrued, beyond the seas, then the person or persons entitled to any such cause of action shall be at liberty to bring the same against such person or persons within such times as are before limited after the return of such person or persons from beyond the seas.
5. Provided always, that if any acknowledgment shall have been made either by writing signed by the party liable by virtue of such indenture, specialty, or recognizance, or his agent, or by part payment or part satisfaction on account of
- rent and on specialties, &c.
- Proviso for actions by infants, femes covert, &c.,
- and for absence of defendants beyond seas.
- Proviso in case of acknowledgment in writing

or by part
payment.

any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid and so acknowledged to be due within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid, or in case the person or persons entitled to such action shall at the time of such acknowledgment be under such disability as aforesaid, or the party making such acknowledgment be, at the time of making the same, beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond the seas, as the case may be; and the plaintiff or plaintiffs in any such action on any indenture, specialty, or recognizance, may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this statute.

p. 153.

Limitation
of new
actions
after judg-
ment.

6. And nevertheless be it enacted, that if in any of the said actions judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff that he take nothing by his plaint, writ, or bill, . . . that in all such cases the party plaintiff, his executors or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed, or such judgment given against the plaintiff, and not after.

p. 148.

p. 563.

No part of
the United
Kingdom,
&c., to be
deemed
beyond the
seas within
the mean-
ing of this
Act.

7. No part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part of the dominions of his Majesty, shall be deemed to be beyond the seas within the meaning of this Act, or of the Act passed in the twenty-first year of the reign of King James the First, intituled, "An Act for Limitation of Actions and for avoiding of Suits in Law."

p. 151.

p. 57.

7 WM. 4 AND 1 VICT. C. 28 (THE REAL PROPERTY LIMITATION ACT, 1837).

p. 455. 1. Whereas doubts have been entertained as to the effect of a certain Act of Parliament made in the third and fourth years of his late Majesty King William the Fourth, intituled an Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the remedies for trying the rights thereto, so far as the same relates to mortgages, and it is expedient that such doubts should be removed, (1) it shall and may be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the first section of the said Act, to make an entry or bring an action at law or suit in equity to recover such land at any time within *twelve* (2) years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than *twelve* (2) years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, anything in the said Act notwithstanding.

Part payment, or payment of interest on mortgage.

(1) See 56 Vict. c. 14.

(2) See 37 & 38 Vict. c. 57, s. 9.

7 & 8 VICT. c. 105, ss. 71-88.

*An Act to confirm and enfranchise the Estates of the Conventi-
ary Tenants of the ancient Assessionable Manors of the
Duchy of Cornwall, and to quiet Titles within the County of
Cornwall as against the Duchy ; and for other purposes.*

[9th August 1844.]

The claims
of the Duke
of Cornwall
generally
to be barred
by the
lapse of
sixty years.

71. And be it enacted, that the Duke of Cornwall shall not at any time hereafter sue, impeach, question, or implead any person for or in anywise concerning any lands, manors, tenements, rents, tithes, or hereditaments whatsoever situate, issuing, or arising in the county of Cornwall (other than liberties or franchises, and other than mines, minerals, stone, or substrata), or for or in anywise concerning the revenues, issues, and profits thereof, or make any title, claim, challenge, or demand of, on, or to the same or any of them (except as aforesaid), by reason of any right or title which hath not first accrued or grown, or which shall not have first accrued or grown, within the space of sixty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission, or other suit or proceeding, as shall at any time or times hereafter be filed, issued, or commenced for recovering the same, or in respect thereof, unless the Duke of Cornwall, or some other person under whom the Duke of Cornwall any thing hath or lawfully claimeth, or shall hereafter have or lawfully claim, in the said manors, lands, tenements, rents, tithes, or hereditaments, by force of any right or title, hath or shall have been answered by force and virtue of any such right or title to the same, the rents, revenues, issues, or profits thereof, within the said space of sixty years, or that the same have or shall have been duly in charge to the Duke of Cornwall, or have or shall have stood insuper of record within the said space of sixty years ; and that all persons, for and according

to their and every of their several estates and interests which they have or claim to have, or shall or may have or claim to have in the same respectively, shall at all times hereafter quietly and freely have, hold, and enjoy, against the Duke of Cornwall claiming any title which hath not first accrued or grown within the said space of sixty years, all and singular manors, lands, tenements, rents, tithes, and hereditaments whatsoever situate, issuing, or arising in the county of Cornwall (except as aforesaid), which they, or their or any of their ancestors or predecessors, or those from whom, by or under whom, they do or shall claim, have or shall have held or enjoyed or taken the rents, revenues, issues, or profits thereof, by the space of sixty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced for recovering the same, or in respect thereof, unless the Duke of Cornwall, or some other person under whom the Duke of Cornwall any thing hath or lawfully claimeth, or shall have or lawfully claim, in the said manors, lands, tenements, rents, tithes, or hereditaments, by force of any right or title, hath been or shall have been answered by virtue of any such right or title, the rents, revenues, issues, or profits thereof, within the said space of sixty years, or that the same have or shall have been duly in charge, or stood insuper of record as aforesaid, within the said space of sixty years.

72. Provided always, and be it enacted, that the Duke of Cornwall, or any person under whom the Duke of Cornwall hath or lawfully claimeth, or shall hereafter have or lawfully claim as aforesaid, shall not be deemed, for the purposes of this Act, to have been answered by force or virtue of any such right or title, the rents, revenues, issues, or profits of any lands, manors, tenements, rents, tithes, or hereditaments which shall have been held or enjoyed, or of which the rents, revenues, issues, or profits shall have been taken, by any other person by the space of sixty years next before the filing, issuing, or commencing of any such action, suit, bill, plaint, information, commission, or other suit or proceeding for recovering the same, or in respect thereof, by reason of the same having been part or parcel of any honour or manor or other hereditament of which the rents, revenues,

The claims of the Duke not to be kept alive by putting a manor in charge, of which the land shall be part.

issues, or profits shall have been answered to the Duke of Cornwall, or any other person under whom the Duke of Cornwall hath or lawfully claimeth, or shall hereafter have or lawfully claim as aforesaid, or which honour or manor or other hereditament shall have been duly in charge to the Duke of Cornwall, or to or with any officer of the Duchy of Cornwall, or stood insuper of record as aforesaid.

Claims of the Duke of Cornwall to mines to be barred by the possession of the land and exclusively working the mines for sixty years.

73. And be it enacted, that the Duke of Cornwall shall not sue, impeach, question, or implead any person for or in anywise concerning any mines, minerals, stone, or substrata in, upon, under, or of any lands, manors, tenements, or hereditaments whatsoever situate in the county of Cornwall, where such lands, manors, tenements, or hereditaments shall have been held or enjoyed by such person, or any person by, through, or under whom he claims, or any person whomsoever other than the Duke of Cornwall, or any person claiming under him, for a period of sixty years or more before the filing, issuing, or commencing any action, bill, plaint, information, commission, or other suit or proceeding in respect of such mines, minerals, stone, or substrata, without interruption or disturbance by the Duke of Cornwall, or any person claiming under him, and where such mines, minerals, stone, or substrata have been substantially worked and gotten at any time during the said period by the person who has so held and enjoyed the said lands, manors, tenements, or hereditaments, and such mines, minerals, stone, or substrata have not been at any time during the said period of sixty years worked and gotten, or the tolls, dues, royalties, and other profits thereof received or enjoyed, by the Duke of Cornwall or some person claiming under him.

p. 523.

Or by the possession of the land for one hundred years.

74. And be it enacted, that the Duke of Cornwall shall not sue, impeach, question, or implead any person for or in anywise concerning any mines, minerals, stone, or substrata in, upon, under, or of any lands, manors, tenements, or hereditaments whatsoever situate in the county of Cornwall, where such lands, manors, tenements, or hereditaments shall have been held or enjoyed by such person, or any person by, through, or under whom he claims, or any person whomsoever other than the Duke of Cornwall, or any person claiming under him, for a period of one hundred years before the filing, issuing, or commencing any action, bill, plaint, information,

p. 523.

commission, or other suit or proceeding in respect of such mines, minerals, stones, or substrata, without interruption or disturbance by the Duke of Cornwall, or any person claiming under him, and where such mines, minerals, stones, or substrata shall not have been at any time during the said period of one hundred years worked and gotten, or the tolls, dues, royalties, or other profits thereof received or enjoyed, by the Duke of Cornwall or some person claiming under him.

p. 525. 75. Provided always, and be it enacted, that where the rents, revenues, issues, or profits of any manors, lands, tenements, tithes, or hereditaments are or shall be duly in charge by, to, or with any proper officer of the Duchy of Cornwall, such rents, revenues, issues, and profits shall be held, deemed, and taken to be duly in charge within the meaning and intent of this Act, any usage or custom to the contrary notwithstanding.

Rents, &c.,
in charge
with the
proper
officer to
be deemed
in charge.

76. Provided always, and be it enacted, that this Act, or any thing herein contained, shall not extend to bar, impeach, or hinder the Duke of Cornwall of, for, or from any manors, tenements, rents, tithes, or hereditaments whereof any reversion or remainder now is in His Royal Highness Albert Edward now Duke of Cornwall, for or concerning the said reversion or remainder, nor of, for, or from any reversion or remainder, or possibility of reversion or remainder, in any of his said Royal Highness's progenitors, predecessors, or ancestors for the time being entitled to the revenues of the said duchy, which by the expiration, end, or other determination of any limited estate has or ought to have fallen or become in possession, or which shall or may or ought hereafter first to fall or come in possession, within the space of sixty years next before the filing, issuing, or commencing of any such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced for recovering the same, or in respect thereof, nor of, for, or from any right or title first accrued or grown to the Duke of Cornwall, or which shall first accrue or grow to the Duke of Cornwall, of, in, or to any manors, lands, tenements, rents, tithes, or hereditaments at any time or times within the space of sixty years next before the filing, issuing, or commencing of any such

Time as to
reversions
not to begin
to run till
they fall
into possession;

action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced for recovering the same, or in respect thereof, and not before.

nor to hereditaments which have been granted for limited estates till such estates fail.

77. Provided also, and be it enacted, that this Act or any thing herein contained shall not extend to any manors, lands, tenements, rents, tithes, or hereditaments mentioned to be granted or conveyed by the Duke of Cornwall, or by any other under whom the Duke of Cornwall claimeth, to any person or persons for any limited estate in fee simple or any estate in tail or other particular estate, which several estates (if the same had been good and effectual in law) have or ought to have first fallen or become in possession, or will or ought first to fall or come in possession, within the space of sixty years next before the filing, issuing, or commencing of any such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced for recovering the same or in respect thereof as aforesaid, nor to any manors, lands, tenements, rents, tithes, or hereditaments mentioned to be granted or conveyed by any of the predecessors, progenitors, or ancestors of his said Royal Highness Albert Edward Duke of Cornwall for the time being entitled to the revenues of the said Duchy of Cornwall, or by any other under whom his said Royal Highness claimeth, to any person or persons in fee tail or other particular estate, whereof the reversion or inheritance (if such estate tail or other particular estate had been good and effectual in law) should have been and continued in his said Royal Highness, or should or ought hereafter to be and continue in the Duke of Cornwall, at any time within the space of sixty years next before the filing, issuing, or commencing of any such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced for recovering the same or in respect thereof as aforesaid.

Estates to remain subject to all rents and duties.

78. Provided also, and be it enacted, that all and singular the manors, lands, tenements, and hereditaments hereinbefore referred to, shall at all times hereafter (except in cases which are otherwise expressly provided for by this Act) be holden of the Duke of Cornwall, and all other persons respectively, by the same tenures, services, fee-farms,

chief rents, heriots, and other duties, to all intents and purposes as the same should or ought of right to be holden if the estates, rights, and interests established and made sure by this present Act had been before the making of this Act firm, good, and effectual in law.

79. Provided also, and be it enacted, that where any fee-farm rent or other rent (not otherwise expressly provided for by this Act) hath been or shall be answered and actually paid to the Duke of Cornwall within the space of sixty years next before any action, bill, plaint, information, commission, or other suit or proceeding shall at any time or times hereafter be filed, issued, or commenced for recovering the same, or in respect thereof, out of any manors, lands, tenements, or hereditaments situate in the county of Cornwall, of which manors, lands, tenements, or hereditaments, the estates, rights, or interests being defective, are established and made good by this present Act, the Duke of Cornwall shall from henceforth for ever (except in cases otherwise expressly provided for by this Act) have, hold, and enjoy the said rents and the arrearages thereof, in such manner and form, and as fully and amply, as the same are or were enjoyed at any time within the said space of sixty years.

Proviso as to rents.

80. Provided always nevertheless, and be it enacted, that this Act or any thing herein contained shall not extend to bar, impeach, or hinder the Duke of Cornwall of or from any lands, mines, minerals, stones, substrata, tenements, or hereditaments which shall in or by such award as aforesaid (1) be determined to belong to the Duke of Cornwall.

Act not to bar any claim of the Duke as to property comprised in the award;

81. Provided always, and be it enacted, that nothing in this Act contained shall extend or be prejudicial to the right, title, or claim of any person in or to any manors, lands, tenements, tithes, mines, minerals, stones, substrata, or hereditaments by virtue of or under any grant, letters patent, or lease from the Duke of Cornwall, made or passed before the first day of May One thousand eight hundred and forty-four, so as such right, title, or claim be prosecuted with effect in a court of competent jurisdiction by some action, suit, or proceeding commenced or instituted before or within the space of one year after the passing of this Act.

nor to prejudice the rights of existing lessees or grantees, if claims be prosecuted within one year.

(1) *I.e.*, the award mentioned in s. 31 of the Act.

In case of claims being prosecuted by such lessees, Act not to prejudice the rights of parties against whom the claims are made.

Rights established by lessees to determine with the grant or lease.

Act not to affect the privileges of the tanners ;

nor extend to royalties, liberties, offices,

82. Provided always nevertheless, that in case any person interested under any such grant, letters patent, or lease as aforesaid, shall make any entry, or prosecute any right, title, or claim, within the period of one year after the passing of this Act, which entry, right, title, or claim shall be in anywise inconsistent with the provisions in this Act contained for the limitations of actions and suits, or which could not have been rightfully made or sustained in case such person had been bound by such provisions, then and in every such case no recital, declaration, or enactment in this Act shall be held or construed to prejudice the right, title, or claim of any person whomsoever against whom any such action or suit may be commenced or prosecuted.

83. Provided also, and be it enacted, that if any such entry, action, or suit shall be made or prosecuted as last aforesaid, and any such possession, right, title, or claim shall be established by such entry, or in action or suit, which shall be inconsistent with the said provisions for the limitation of actions and suits as aforesaid, or which could not have been established if such person or persons as aforesaid had been bound by such provisions, then and in such case such possession, right, title, or claim shall be absolutely determined and of none effect from and immediately after the determination, by lapse of time, surrender, forfeiture, or otherwise, of the grant, letters patent, or lease by virtue whereof the person making such entry, or commencing such action or suit, shall have claimed or been entitled.

84. Provided always, and be it enacted, that nothing in this Act contained shall authorize the aforesaid commissioners (1) to inquire into or determine concerning, or shall in anywise prejudice, affect, or extend to any lawful right, profit, privilege, or easement to which the tanners of the county of Cornwall are or claim to be entitled, as such tanners, under or by force of any statute, custom, prescription, or royal charter ; but the same shall be and remain in full force and vigour as if this Act had never passed.

85. Provided always, and be it enacted, that nothing in this Act contained shall authorize the aforesaid commissioners (1) to inquire into or determine concerning, or shall

(1) See s. 31.

in anywise affect or extend to any royalty, liberty, office, or franchise which has at any time heretofore been let in convention, or granted by assession, or any estate, right, title, or interest therein. or franchises let in convention;

p. 523.

86. Provided also, and be it enacted, that nothing in this Act contained shall authorize the aforesaid commissioners (1) to inquire into or determine the property or right of or to any navigable river, estuary, port, or branch of the sea, or the fundus or soil of any navigable river, estuary, port, or branch of the sea, or the shores between high and low water mark thereof respectively, or any franchise, royalty, or jurisdiction in or over such navigable river, estuary, port, or branch of the sea or shores respectively, or any boundary question, claim, or right whatsoever, in anywise relating to the matters aforesaid, or any of them; and that nothing in this Act contained shall in anywise conclude, prejudice, affect, or extend to any property, right, claim, or question whatsoever of, to, or concerning the matters aforesaid, or any of them. nor to navigable rivers, estuaries, branches of the sea, or sea shore.

87. Provided always, and be it enacted, that this Act or any thing herein contained shall in nowise alter or affect the operation, extent, or construction of an Act made and passed in the session holden in the second and third years of the reign of his late Majesty King William the Fourth, intituled *An Act for shortening the time required in claims of modus decimandi, or exemption from or discharge of tithes*, or anything therein contained. Act not to affect the Act of 2 & 3 Wm. IV. c. 100.

88. Provided always, and be it enacted and declared, that the provisions herein-before contained for the limitation of actions and suits, and the several other provisions, matters, and things herein contained, shall apply only to lands, manors, tenements, rents, tithes, mines, minerals, stone, substrata, hereditaments, and other things situate, issuing, arising, or being in the county of Cornwall. Provisions for limitations of actions, &c., to apply only to lands, &c., in Cornwall.

(1) See s. 31.

16 & 17 VICT. C. 113 (IRISH COMMON LAW PROCEDURE
AMENDMENT ACT, 1853), SS. 20—27.

*An Act to amend the procedure in the Superior Courts of
Common Law in Ireland.*

With respect to the period of limitation within which
personal actions shall be brought;—

Limitation
of certain
actions.

20. All actions for rent upon an indenture of demise, all
actions upon any bond or other specialty, or upon any
judgment, statute staple, statute merchant, or recognizance,
shall be commenced and sued within twenty years after the
cause of such actions or suits, or the recovery of such judg-
ment, but not after; all actions grounded upon any lending
or contract, express or implied, without specialty, or upon any
award, where the submission is not by specialty, or for any
money levied on *fiery facias*; all actions of account or for not
accounting, other than for such accounts as concern the trade
of merchandise between merchant and merchant, their
factors or servants; all actions for direct injuries to real or
personal property; actions for the taking away, detention, or
conversion of property, goods and chattels; actions for libel,
malicious prosecution and arrest, seduction, criminal con-
versation; and actions for all other causes which would
heretofore have been brought in the form of action called
trespass on the case, except as herein-after excepted, shall be
commenced and sued within six years after the cause of such
actions, but not after; and all actions for assault, menace,
battery, wounding and imprisonment, shall be commenced
and sued within four years after the cause of such actions,
but not after; and all actions for words, and for penalties,
damages, or sums of money given to the party grieved, by
any statute now or hereafter to be in force, shall be com-
menced and sued within two years after the words spoken,

p. 143.

p. 138.

or the cause of such action or suit, but not after; and with respect to every cause of action not herein specifically provided for, being the subject matter of a personal action, such actions in respect thereof shall be brought within the same period of limitation now applicable thereto, notwithstanding that such cause of action may be described or expressed in such statutes by reference to any particular form of action; provided that nothing in this Act contained shall alter the period of limitation of any action given by any statute where the time for bringing such action is, or shall be, by any statute specially limited.

p. 563. 21. If in any of the said actions judgment be given for the plaintiff and the same be reversed by error, or a verdict pass, or upon judgment by default, damages be assessed for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff that he take nothing by his plaint, in all such cases the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit from time to time within the period of limitation herein-before provided for in such action, or within a year after such judgment reversed, or judgment given against the plaintiff, and not after.

Limitation
after judg-
ment ar-
rested or
reversed.

p. 61. 22. If any person that is or shall be entitled to any such action is or shall be at the time of any such cause of action accrued within the age of twenty-one years, a married woman, of unsound mind, or beyond the seas, then such person shall be at liberty to bring the same action, so as he commence the same within such time after the cessation of such disability or his return from beyond the seas, as other persons having no such impediment should, according to the provisions of this Act, have done; and if any person or persons against whom there shall be any such cause of action is or shall be at the time such cause of action accrued beyond the seas, then the person entitled to any such cause of action shall be at liberty to bring the same against such person, within such time as is before limited, after the return of such person from beyond the seas.

Disabili-
ties.

23. If any acknowledgment shall have been or shall be made, either by writing signed by the party liable by virtue of any indenture, specialty, judgment, statute staple, or statute merchant, or recognizance, or his agent, or by part

Acknow-
ledgments
and part
payments.

payment or part satisfaction on account of any principal or interest being then due thereon, it shall be lawful for the person entitled to bring his action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment by writing, or part payment or part satisfaction as aforesaid, or in case the person entitled shall at the time of such acknowledgment be under such disability as aforesaid, or the party making such acknowledgment be at the time of making the same beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond the seas, as the case may be; and the plaintiff in any such action on any indenture, specialty, judgment, statute staple, or statute merchant, or recognizance, may rely on such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this statute.

p. 227.

Acknowledgments of simple contract debts to be in writing.

24. In actions grounded upon any simple contract no acknowledgment or promise shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the provisions of this Act in relation to the limitation of actions, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of this Act so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them; provided always that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whomsoever.

p. 133.

Indorsements on bills.

25. No indorsement or memorandum of any payment written or made upon any promissory note, bill of exchange, or other writing by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment so as to take the case out of the operation of the provisions of this Act in relation of the limitation of actions.

p. 133.

- p. 140. 26. This Act shall be deemed and taken to apply to the Set off.
case of any debt alleged by way of set off on the part of any
defendant.
- p. 138. 27. No memorandum or other writing made necessary by Stamps.
this Act shall be deemed to be an agreement within the
meaning of any statute relating to the duties on stamps.

19 & 20 VICT. C. 97 (MERCANTILE LAW AMENDMENT ACT, 1856),
ss. 9—14.

*An Act to amend the laws of England and Ireland affecting
Trade and Commerce.*

Merchants'
accounts.

9. All actions of account or for not accounting, and suits for such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, shall be commenced and sued within six years after the cause of such actions or suits, or when such cause has already arisen then within six years after the passing of this Act; and no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit by reason only of some other matter of claim comprised (1) in the same account having arisen within six years next before the commencement of such action or suit.

p. 5.

Plaintiff
beyond seas
or im-
prisoned.

10. No person or persons who shall be entitled to any action or suit, with respect to which the period of limitation within which the same shall be brought is fixed by the Act of the twenty-first year of the reign of King James the First, chap. 16, c. 3, or by the Act of the fourth year of the reign of Queen Anne, chap. 16, sec. 17, or by the Act of the fifty-third year of the reign of King George the Third, chap. 127, sec. 5, or by the Acts of the third and fourth years of the reign of King William the Fourth, chap. 27, secs. 40, 41, and 42, and chap. 42, sec. 3, or by the Act of the sixteenth and seventeenth years of the reign of her present Majesty, chap. 113, sec. 20, shall be entitled to any time within which to commence and sue such action or suit beyond the period so fixed for the same by the enactments aforesaid, by reason only of such person, or some one or more of such persons being at the time of such cause of action or suit accrued beyond the seas, or in the cases in which by virtue of any of the aforesaid

p. 55.

p. 60.

(1) See *Knox v. Gye*, L. R. 5 H. L., at p. 673.

enactments, imprisonment is now a disability, by reason of such person or some one or more of such persons being imprisoned at the time of such cause of action or suit accrued.

p. 60. 11. Where such cause of action or suit with respect to which the period of limitation is fixed by the enactments aforesaid, or any of them, lies against two or more joint debtors, the person or persons who shall be entitled to the same shall not be entitled to any time within which to commence and sue any such action or suit against any one or more of such joint debtors who shall not be beyond the seas at the time such cause of action or suit accrued, by reason only that some other one or more of such joint debtors was or were at the time such cause of action accrued beyond the seas, and such person or persons so entitled as aforesaid shall not be barred from commencing and suing any action or suit against the joint debtor or joint debtors who was or were beyond the seas at the time the cause of action or suit accrued, after his or their return from beyond the seas, by reason only that judgment was already recovered against any one or more of such joint debtors who was not or were not beyond seas at the time aforesaid.

One of two joint debtors beyond seas.

p. 57. 12. No part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney and Sark, nor any islands adjacent to any of them, being part of the dominions of Her Majesty, shall be deemed to be beyond seas within the meaning of the Act of the fourth and fifth years of the reign of Queen Anne, chap. 16, or of this Act.

Beyond seas.

p. 96. 13. In reference to the provisions of the Acts of the ninth year of the reign of King George the Fourth, chap. 14, sects. 1 and 8, and the sixteenth and seventeenth years of the reign of her present Majesty, chap. 113, sects. 24 and 27, an acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby, duly authorised to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself.

Acknowledgment signed by agent.

14. In reference to the provisions of the Acts of the twenty-first year of the reign of King James the First, chap. 16, sect. 3, and of the Act of the third and fourth years of the reign of King William the Fourth, chap. 42, sect. 3, and

Part payment by one co-debtor.

of the Act of the sixteenth and seventeenth years of the reign of her present Majesty, chap. 113, sect. 20, when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any contractor, no such co-contractor, or co-debtor, executor, or administrator shall lose the benefit of the said enactments, or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money, by any other or others of such co-contractors or co-debtors, executors, or administrators.

23 & 24 VICT. c. 38, ss. 13 & 15,

An Act to further amend the law of property.

[23rd July 1860.]

13. Whereas by the Act of Parliament of the third and fourth of William the Fourth, chapter twenty-seven, section forty, it was enacted that after the thirty-first day of December One thousand eight hundred and thirty-three no action or suit or other proceeding should be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same should have accrued to some person capable of giving a discharge for or release of the same, unless such acknowledgment in writing or payment of principal or interest as therein mentioned should have been given or made, and then within twenty years next after such payment or acknowledgment, or the last of such payments or acknowledgments: and whereas it is expedient that the said enactment should be extended to the case of claims to the estates of persons dying intestate: Be it therefore enacted, that after the thirty-first day of December One thousand eight hundred and sixty no suit or other proceeding shall be brought to recover the personal estate, or any share of the personal estate, of any person dying intestate, possessed by the legal personal representative of such intestate, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of such estate or share, or some interest in respect thereof, shall have been accounted for or paid, or some acknowledgment of the right thereto shall have been given in writing, signed by

Extension
of Sect. 40
of 3 &
4 Wm. IV.
c. 27,
to cases of
claims to
estates of
intestates.

the person accountable for the same, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit shall be brought, but within twenty years after such accounting, payment, or acknowledgment, or the last of such accountings, payments, or acknowledgments, if more than one was made or given.

Act not to
extend to
Scotland,
&c.

15. This Act is not to extend to Scotland, nor are any of the clauses, except clause six and the subsequent clauses, to extend to Ireland.

23 & 24 VICT. C. 53, SS. 1, 2, AND 4.

An Act for the limitation of actions and suits by the Duke of Cornwall in relation to real property, and for authorising certain leases of possessions of the Duchy.

[23rd July 1860.]

WHEREAS by an Act passed in the ninth year of King George the Third, chapter sixteen, provision is made for limiting the right of the King's Majesty, his heirs and successors, to sue, impeach, question, or implead any person, body politic or corporate, for or concerning any manors, lands, tenements, rents, tithes, or hereditaments whatsoever (other than liberties or franchises), or for or concerning the revenues, issues, or profits thereof, and for quieting possessions and titles against the Crown: And whereas an Act was passed in the session holden in the seventh and eighth years of Her Majesty, chapter one hundred and five, "to confirm and enfranchise the estates of the conventional tenants of the ancient assessionable manors of the Duchy of Cornwall, and to quiet titles within the county of Cornwall as against the Duchy, and for other purposes," but the provisions of the said Act for quieting titles within the county of Cornwall as against the Duchy do not extend to any property, right, claim, or question of, to, or concerning navigable rivers, estuaries, ports, or branches of the sea, or the fundus or soil thereof respectively, or the shores between high and low water mark thereof respectively: And whereas it is expedient that as to hereditaments not within the county of Cornwall, and also as to such hereditaments within the said county as are excepted from the provisions of the said Act of the seventh and eighth years of Her Majesty, the limitation applicable to actions and suits by the Crown should be made applicable to actions and suits by the Duke of Cornwall: Be

9 Geo. III.
c. 16.

7 & 8 Vict.
c. 105.

it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Provisions of 9 Geo. III. c. 16, as to limitations of actions and suits to extend to the Duke of Cornwall.

1. All the provisions of the said Act of the ninth year of King George the Third now applicable to Her Majesty, her heirs and successors, shall extend and be applicable to the Duke of Cornwall, in like manner as if the same were re-enacted and the Duke of Cornwall were throughout mentioned or referred to where the "King's Majesty" or "His Majesty" is in the said Act mentioned or referred to, subject nevertheless as to the property and possessions included in this Act, to the provisions contained in sections seventy-two and seventy-five of the Act of the seventh and eighth years of Her Majesty above referred to with respect to the property and possessions included therein.

p. 524.

Nothing to affect provisions of 7 & 8 Vict. c. 105, 2 & 3 Wm. IV. c. 71, and 2 & 3 Wm. IV. c. 100.

2. Provided always, that nothing herein-before contained shall extend to the property or possessions in relation to which provision for the limitation of actions and suits and for quieting titles is made by the said Act of the seventh and eighth years of Her Majesty, or affect the provisions of the Act of the session holden in the second and third years of His late Majesty, chapter seventy-one, "for shortening the time of prescription in certain cases," or of the Act of the same session of Parliament, chapter one hundred, "for shortening the time required in claims of *modus decimandi* or exemption from or discharge of tithes."

p. 524.

Construction of the expression "Duke of Cornwall."

4. In the construction of this Act the expression "the Duke of Cornwall" shall include as well His Royal Highness Albert Edward now Duke of Cornwall as his predecessors and successors Dukes of Cornwall, and also the Queen's most excellent Majesty and her predecessors and successors, Kings and Queens of England for the time being, entitled to the lands and possessions of the Duchy of Cornwall or the revenues thereof during a vacancy of the Duchy of Cornwall.

24 & 25 VICT. C. 62 (THE CROWN SUITS ACT, 1861).

An Act to amend the Act of the ninth year of King George the Third, chapter sixteen, for quieting possessions and titles against the Crown, and also certain Acts for the like object relating to suits by the Duke of Cornwall.

[1st August 1861.]

WHEREAS by an Act passed in the ninth year of King George the Third, chapter sixteen, provision is made for limiting the right of the King's Majesty to sue and implead any person for or concerning lands and hereditaments, or the rents, issues, or profits thereof, and for quieting possessions and titles against the Crown: And whereas the good purpose of that Act has not been fully obtained by reason of the provisions therein relating to lands and hereditaments which have been in charge to Her Majesty or have stood insuper of record, and also by reason of certain provisions therein relating to lands and hereditaments part or parcel of honours, manors, or other hereditaments: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The Queen's Majesty, her heirs and successors, shall not at any time hereafter sue, impeach, question, or implead any person or persons for or in anywise concerning any manors, lands, tenements, rents, tithes, or hereditaments whatsoever (other than liberties or franchises) which such person or persons, or his or their or any of their ancestors or predecessors, or those from, by, or under whom they do or shall claim, have, or shall have held or enjoyed or taken the rents, revenues, issues, or profits thereof by the space of sixty years next before the filing, issuing, or commencing of every such

The Crown not to sue after sixty years by reason of lands having been in charge, &c.

action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced for recovering the same or in respect thereof, by reason only that the same manors, lands, tenements, rents, tithes, or hereditaments, or the rents, revenues, issues, or profits thereof, have or shall have been in charge to Her Majesty or her predecessors or successors, or stood insuper of record, within the said space of sixty years, but that such having been in charge and such standing insuper of record shall be as against such person and persons, and all claiming by, from, or under them or any of them, of no force and effect.

Provisions
of this Act
to apply to
actions by
the Duke of
Cornwall,
and to pro-
visions of
7 & 8 Vict.
c. 105, and
23 & 24
Vict. c. 53.

2. And whereas an Act was passed in the session held in the seventh and eighth years of Her Majesty, chapter one hundred and five, "for quieting titles within the county of Cornwall as against the Duchy of Cornwall, and other purposes:" And whereas another Act was passed in the session held in the twenty-third and twenty-fourth years of Her Majesty, chapter fifty-three, "for the limitation of actions and suits by the Duke of Cornwall in relation to real property, and for other purposes:" And whereas it is expedient that the limitation applicable to actions and suits by the Crown should be made applicable to actions and suits by the Duke of Cornwall: Be it enacted, that the provisions of this Act herein-before contained applicable to the Queen's Majesty shall extend and be applicable to the Duke of Cornwall, and to the said two last-recited Acts, in the same manner as if the Duke of Cornwall were herein-before mentioned or referred to where the Queen's Majesty is mentioned or referred to; and this Act shall be construed together with and be deemed to form part of the said two last-recited Acts.

Provision
as to the
answering
of rent, &c.,
to the
Crown.

3. The Queen's Majesty, her predecessors and successors, shall not be held, deemed, or taken, for the purposes of the said Act of the ninth year of King George the Third, to have been answered the rents, revenues, issues, or profits of any lands, manors, tenements, rents, tithes, or hereditaments which shall have been held or enjoyed, or of which the rents, revenues, issues, or profits shall have been taken, by any other persons or person, by the space of sixty years next before the filing, issuing, or commencing of any such action,

suit, bill, plaint, information, commission, or other suit or proceeding for recovering the same or in respect thereof, as in the said Act is mentioned, by reason only of the same lands, manors, tenements, rents, tithes, or hereditaments having been part or parcel of any honour or manor or other hereditaments of which the rents, revenues, issues, or profits shall have been answered to Her Majesty or her predecessors or successors, or some other person under whom Her Majesty hath or lawfully claimeth or shall hereafter have or lawfully claim as aforesaid, or of any honour, manor, or other hereditaments which shall have been duly in charge to Her Majesty, her predecessors or successors, or stood insuper of record as aforesaid.

p. 522. 4. In the construction of the said Act of the ninth year of King George the Third and of this Act the right or title of the Queen's Majesty, her heirs or successors, or of the Duke of Cornwall, to any manors, lands, tenements, rents, tithes, or hereditaments which are now or shall at any time hereafter be subject to or comprised in any demise or lease for any term or terms of years, or for any life or lives, granted by or on behalf of Her Majesty, or any of her royal predecessors or successors, or the Duke of Cornwall, shall not be deemed to have first accrued or grown until the expiration or determination of such demise or lease as against any person or persons whose possession, holding, or enjoyment of such manors, lands, tenements, rents, tithes, or hereditaments, or whose receipt of the rents, issues, or profits thereof, shall have commenced during the term of such demise or lease, or who shall claim from, by, or under any person or persons whose possession, holding, or enjoyment of such manors, lands, tenements, rents, tithes, or hereditaments, or whose receipt of the rents, issues, or profits thereof, shall have so commenced as aforesaid.

Preserving
right to
reversion-
ary in-
terests.

5. Nothing contained in this Act shall extend to any action, bill, plaint, information, commission, or other suit or proceeding instituted or commenced before the passing of this Act and now pending.

Act not to
apply to
existing
suits.

37 & 38 VICT. C. 57 (THE REAL PROPERTY LIMITATION ACT, 1874).

*An Act for the further Limitation of Actions and Suits relating to
Real Property.* [7th August 1874.]

WHEREAS it is expedient further to limit the times within which actions or suits may be brought for the recovery of land or rent, and of charges thereon :

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

No land or rent to be recovered but within twelve years after the right of action accrued.

1. After the commencement of this Act no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims ; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same.

p. 276.

Provision for case of future estates.

2. A right to make an entry or distress, or to bring an action or suit, to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion or remainder, or other future estate or interest, at the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land or rent, or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined, have been in the possession or receipt of the

p. 314.

p. 323. profits of such land, or in receipt of such rent: But if the person last entitled to any particular estate on which any future estate or interest was expectant shall not have been in the possession or receipt of the profits of such land, or in receipt of such rent, at the time when his interest determined, no such entry or distress shall be made, and no such action or suit shall be brought, by any person becoming entitled in possession to a future estate or interest, but within twelve years next after the time when the right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the person whose interest shall have so determined, or within six years next after the time when the estate of the person becoming entitled in possession shall have become vested in possession, whichever of those two periods shall be the longer; and if

p. 325. the right of any such person to make such entry or distress, or to bring any such action or suit, shall have been barred under this Act, no person afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will, or settlement, executed or taking effect after the time when a right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the owner of the particular estate whose interest shall have so determined as aforesaid, shall make any such entry or distress, or bring any such action or suit, to recover such land or rent.

Time limited to six years when person entitled to the particular estate out of possession, &c.

p. 390. 3. If at the time at which the right of any person to make an entry or distress, or to bring an action or suit, to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned, (that is to say,) infancy, coverture, idiotcy, lunacy, or unsoundness of mind; then such person, or the person claiming through him, may, notwithstanding the period of twelve years, or six years, (as the case may be,) herein-before limited shall have expired, make an entry or distress, or bring an action or suit, to recover such land or rent, at any time within six years next after the time at which the person to whom such right shall first have accrued shall have ceased to be under any such disability, or shall have died (whichever of those two events shall have first happened).

In cases of infancy, coverture, or lunacy at the time when the right of action accrues, then six years to be allowed from the termination of the disability or previous death.

No time to
be allowed
for absence
beyond
seas.

4. The time within which any such entry may be made, or any such action or suit may be brought as aforesaid, shall not in any case after the commencement of this Act be extended or enlarged by reason of the absence beyond seas during all or any part of that time of the person having the right to make such entry, or to bring such action or suit, or of any person through whom he claims.

p. 391.

Thirty
years ut-
most allow-
ance for
disabilities.

5. No entry, distress, action, or suit shall be made or brought by any person who at the time at which his right to make any entry or distress, or to bring an action or suit, to recover any land or rent, shall have first accrued, shall be under any of the disabilities herein-before mentioned, or by any person claiming through him, but within thirty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such thirty years, or although the term of six years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired.

p. 391.

In case of
possession
under an
assurance
by a tenant
in tail,
which shall
not bar the
remain-
ders, they
shall be
barred at
the end of
twelve
years after
that period,
at which
the assur-
ance, if
then exe-
cuted,
would have
barred
them.

6. When a tenant in tail of any land or rent shall have made an assurance thereof which shall not operate to bar the estate or estates to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person or any other person whosoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail) shall continue or be in such possession or receipt for the period of twelve years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then, at the expiration of such period of twelve years, such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail.

p. 403.

p. 462.

7. When a mortgagee shall have obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage but within twelve years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of his right to redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee or the person claiming through him; and in such case no such action or suit shall be brought but within twelve years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage

Mortgagor to be barred at end of twelve years from the time when the mortgagee took possession or from the last written acknowledgment.

money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.

Money charged upon land and legacies to be deemed satisfied at the end of twelve years if no interest paid nor acknowledgment given in writing in the meantime.

8. No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given.

p. 164.

p. 175.

p. 190.

p. 219.

Act to be read with 3 & 4 Wm. 4, c. 27, of which certain parts are repealed, and other parts to be read in reference to alteration by this Act.

9. From and after the commencement of this Act all the provisions of the Act passed in the session of the third and fourth years of the reign of His late Majesty King William the Fourth, chapter twenty-seven, except those contained in the several sections thereof next herein-after mentioned, shall remain in full force, and shall be construed together with this Act, and shall take effect as if the provisions herein-before contained were substituted in such Act for the provisions contained in the sections thereof numbered two, five, sixteen, seventeen, twenty-three, twenty-eight, and forty respectively (which several sections, from and after the commencement of this Act, shall be repealed) (1), and as if the term of six years had been mentioned, instead of the term of ten years, in the section of the said Act numbered eighteen, and the period of twelve years had been mentioned in the said section eighteen instead of the period of twenty years; and the provisions of the Act passed in the session of the seventh year of the reign of His late Majesty King William the Fourth, and the first year of

p. 167.

7 Wm. 4 & 1 Vict. c. 28, to be read with this Act.

(1) The words within brackets are repealed by the Statute Law Revision Act, 1883 (46 & 47 Vict. c. 39).

the reign of Her present Majesty, chapter twenty-eight, shall remain in full force, and be construed together with this Act, as if the period of twelve years had been therein mentioned instead of the period of twenty years.

p. 428. 10. After the commencement of this Act no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable, and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust.

Time for recovering charges and arrears of interest not to be enlarged by express trusts for raising same.

11. This Act may be cited as the "Real Property Limitation Act, 1874."

Short title.

12. This Act shall commence and come into operation on the first day of January one thousand eight hundred and seventy-nine.

Commencement of Act.

39 & 40 VICT. C. 37 (NULLUM TEMPUS (IRELAND) ACT, 1876).

An Act to assimilate the law in Ireland to the law in England as to quieting possessions and titles against the Crown.

[11th August 1876.]

4 Geo. III.
c. 16, 48
Geo. III.
c. 47, 24
& 25 Vict.
c. 62.

WHEREAS by an Act passed in the twenty-fourth and twenty-fifth years of Her Majesty, certain provisions were made for the better quieting possessions and titles against the Crown in England, and it is expedient to extend these provisions to Ireland in order that the Crown shall have no greater right over the estates of its subjects in Ireland than what it enjoys over the estates of its subjects in England :

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

The Crown
not to sue
for lands,
&c., after
sixty years
by reason
only of
same
having
been in
charge.

1. The Queen's Majesty, her heirs and successors, shall not at any time hereafter sue, impeach, question, or implead any person or persons for or in anywise concerning any manors, lands, tenements, rents, tithes, or hereditaments whatsoever (other than liberties or franchises) which such person or persons, or his or their or any of their ancestors or predecessors, or those from, by, or under whom they do or shall claim, have, or shall have held or enjoyed or taken the rents, revenues, issues, or profits thereof, by the space of sixty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced for recovering the same or in respect thereof, by reason only that the same manors, lands, tenements, rents, tithes, or hereditaments, or the rents, revenues, issues, or profits thereof, have or shall have been in charge to

Her Majesty or her predecessors or successors within the said sixty years, but that such having been in charge shall be, as against such person and persons, and all claiming by, from, and under them or any of them, of no force or effect.

2. The Queen's Majesty, her predecessors and successors, shall not be held, deemed, or taken for the purpose of any suit, bill, plaint, information, commission, or other proceeding to have been answered the rents, revenues, issues, or profits of any lands, manors, tenements, rents, tithes, or hereditaments which shall have been held or enjoyed, or of which the rents, revenues, issues, or profits shall have been taken, by any other person or persons by the space of sixty years next before the filing, issuing, or commencing of any such action, suit, bill, plaint, information, commission, or other proceeding for recovering the same or in respect thereof, by reason only of the same lands, manors, tenements, rents, tithes, or hereditaments having been part or parcel of any honour or manor or other hereditaments of which the rents, revenues, issues, or profits shall have been answered to Her Majesty, her predecessors or successors, or some other person under whom Her Majesty, her predecessors or successors, hath or lawfully claimeth or shall hereafter have or lawfully claim as aforesaid, or of any honour, manor, or other hereditaments which shall have been duly in charge to her Majesty, her predecessors or successors as aforesaid.

The Crown not to sue after sixty years by reason only of the lands, &c., sued for being part of a manor &c., of which the rents, &c., have been answered to Her Majesty, &c.

3. In the construction of the Act passed in the forty-eighth year of the reign of His late Majesty King George the Third, chapter forty-seven, and of this Act, the right or title of the Queen's Majesty, her heirs or successors, to any manors, lands, tenements, rents, tithes, or hereditaments which are now or shall at any time hereafter be subject to or comprised in any demise or lease for any term or terms of years, or for any life or lives granted by or on behalf of her Majesty, or any of her royal predecessors or successors, shall not be deemed to have first accrued or grown until the expiration or determination of such demise or lease as against any person or persons whose possession, holding, or enjoyment of such manors, lands, tenements, rents, tithes, or hereditaments, or whose receipt of the rents, issues, or profits thereof shall have commenced during the term of such demise or lease, or who shall claim from, by, or under any person or persons

Preserving right to reversionary interests.

whose possession, holding, or enjoyment of such manors, lands, tenements, rents, tithes, or hereditaments, or whose receipt of the rents, issues, or profits thereof shall have so commenced as aforesaid.

Act not to
apply to
existing
suits.

4. Nothing contained in this Act shall extend to any action, bill, plaint, information, commission, or other suit or proceeding instituted or commenced before the passing of this Act, and now pending.

This Act
to be read
as one Act
with 48
Geo. III.
c. 47.

5. This Act may be cited as "The Nullum Tempus (Ireland) Act, 1876," and shall be read and construed with the Act for quieting possessions and confirming defective titles in Ireland passed in the forty-eighth year of His Majesty King George the Third.

51 & 52 VICT. C. 59 (TRUSTEE ACT, 1888), ss. 8 & 12.

An Act to amend the law relating to the duties, powers, and liability of Trustees.

[24th December 1888.]

p. 258. 8.—(1.) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply :—

Statute of Limitations may be pleaded by trustees.

p. 260. (a.) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him :

p. 260. (b.) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.

p. 439. (2.) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had

brought such action or other proceeding and this section had been pleaded.

(3.) This section shall apply only to actions or other proceedings commenced after the first day of January One thousand eight hundred and ninety, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing statute of limitations.

Application
of Act.

12.—(1.) This Act shall apply as well to trusts created by instrument executed before as to trusts created after the passing of this Act.

(2.) Provided always, that save as in this Act expressly provided, nothing therein contained shall authorise any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument or instruments creating the trust.

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